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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

~~79~~-1080

No. .....

DETROIT POLICE OFFICERS ASSOCIATION,
A Voluntary Mutual Benefit Association, Labor Organization,
Petitioner,

v.

COLEMAN A. YOUNG,
Mayor of the City of Detroit, et al.,
Respondents,

WILLIAM MORGAN, BRIAN BRUNETT
and DONALD PRINCE,
Individually and as Representatives of a Class,
Petitioners,

v.

COLEMAN A. YOUNG,
Mayor of the City of Detroit, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS AND ORDERS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
I. HISTORY OF THE LITIGATION	5
II. FACTUAL BACKGROUND	7
A. The City's Recruiting Practices Prior To July, 1974	7
B. The City's Hiring Practices Prior To July, 1974	11
C. The City's Promotional Practices Prior To July, 1974	12
(1) The Evidence Of "Job Assignment" Discrimination Is Inconclusive	12
(2) Components Of The Promotional Model	14
(3) Creation Of A Job Related Promotional Exam	15
(4) Cumulative Effect Of The Promotional Model	17
D. The Creation Of The Promotional Quota	19
(1) The Appointment Of Philip G. Tannian As Commissioner Of Police By Mayor Coleman A. Young	19
(2) Hearings Before The Board Of Police Commissioners	20

Page

E. Promotions From Personnel Order No. 74-108 23

F. Promotions From Personnel Order No. 75-352 And No. 76-441 25

G. The City's Defense Of Operational Needs .. 26

REASONS FOR GRANTING THE WRIT 29

I. THE COURT OF APPEALS ERRED IN FINDING THAT THE CITY'S UNILATERAL IMPOSITION OF A STRICT RACIAL QUOTA IN PLACE OF A BONA FIDE MERIT SYSTEM OF PROMOTION DID NOT VIOLATE TITLE VII 31

A. The Sixth Circuit Erred In Finding Post-Act Discrimination 32

B. The Sixth Circuit Erred In Applying *Weber* To The Public Sector 36

C. The Sixth Circuit Erred In Declining To Find The City's Quota To Be An Unreasonable Remedy For Past Discrimination ... 39

(1) The Non-Negotiated Abolition Of A Bona Fide Merit Promotional System Renders The Quota, Per Se, Unreasonable 40

(2) The City's Racial Quota Unnecessarily Trammels The Rights Of White Officers Seeking Promotion 43

(3) The City's Racial Quota Unreasonably Foisted The Economic And Social Burdens Of Its Wrongdoing Upon The Plaintiffs 47

Page

II. THE COURT OF APPEALS ERRED IN DISMISSING PLAINTIFFS' CLAIM UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 51

A. The Sixth Circuit's View Of The Title VI Claim Is Contrary To The Majority View In *Bakke* 53

B. The Sixth Circuit's Interpretation Of Title VI Is Contrary To The Fourth Circuit's Opinion In *Uzzell* v. *Friday* 55

III. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S FINDING THAT THE RACIAL QUOTA VIOLATED THE FOURTEENTH AMENDMENT 59

A. A Majority Of The Court Has Not Ruled Upon The Constitutionality Of Racial Quotas In The Public Sector 59

B. The Constitutional Standard Adopted By The Sixth Circuit 61

C. Classifications Based Upon Race Are Constitutionally Suspect And Must Be Subject To The Most Rigid Judicial Scrutiny ... 65

D. The City Has Not Justified Its Racial Classification By Showing A Compelling State Interest 67

(1) There Was No Evidence Or Finding Of Prior Promotional Discrimination .. 68

(2) The Scope Of The Remedy Allowed By The Sixth Circuit Improperly Exceeds The Extent Of Any Unlawful Violations 70

Page

(3) The Court Of Appeals Improperly Disregarded The District Court's Finding As To The Relevant Labor Market 72

(4) The Court of Appeals Has Identified No Unconstitutional Discrimination Against Blacks In The Hiring Practices Of The Department 77

(5) The Goal Of A Department-Wide Racial Balance Does Not Provide A Compelling State Interest For A Racial Quota 81

(6) The City Failed To Establish That No Other Alternatives Available Would Have Achieved The State's Goal With Less Racial Impact 86

CONCLUSION 87

APPENDIX

OPINION OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT OF OCTOBER 12, 1979 .... 1a

MEMORANDUM OPINION OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN OF FEBRUARY 27, 1978 ..... 41a

JUDGMENT OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT OF OCTOBER 12, 1979 ..... 105a

CONSTITUTIONAL AND STATUTORY PROVISIONS 107a

TABLE OF AUTHORITIES

FEDERAL CASES: Page

Afro-American Patrolmen's League v. *Duck*, 503 F.2d 294 (6th Cir. 1974) 73

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 41, 48, 69

Alexander v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977) 74

Ashwander v. *TVA*, 297 U.S. 288 (1936) 59

Austin Independent School District v. *United States*, 429 U.S. 900 (1976) 78

Baker v. *City of St. Petersburg*, 400 F.2d 294 (1968) 84, 85, 86

Beacon Theaters, Inc. v. *Westover*, 359 U.S. 500 (1959).. 3

Boston Chapter, NAACP, Inc. v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. den.*, 421 U.S. 910 (1975).. 73

Bridgeport Guardians, Inc. v. *Members of the Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973) 31, 44, 46

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 44

Brown v. *Board of Education*, 349 U.S. 294 (1954) 85, 86

Califano v. *Goldfarb*, 430 U.S. 189 (1977) 64

Califano v. *Webster*, 430 U.S. 313 (1977) 63

Cassell v. *Texas*, 339 U.S. 282 (1950) 83

Chance v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. den.*, 431 U.S. 965 (1977) 46

Civil Rights Cases, 109 U.S. 3 (1883) 37

Columbus Board of Education v. *Penick*, 99 S.Ct. 2941 (1979) 79, 80

Page

Cooper v. *Aaron*, 358 U.S. 1 (1958) 85

Craig v. *Boren*, 429 U.S. 190 (1976) 63, 64

Dayton Board of Education v. *Brinkman*, 433 U.S. 406 (1977) 70

Defunis v. *Odegaard*, 416 U.S. 312 (1974) 60, 83

Detroit Police Officer's Association v. *Young*, 446 F. Supp. 979 (E.D. Mich. 1978) .....passim

Dunn v. *Blumstein*, 405 U.S. 330 (1972) 67

EEOC v. *Local 14, International Union of Operating Engineers*, 553 F.2d 251 (2d Cir. 1977) 74

EEOC v. *Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979) 31, 35

Erie Human Relations Committee v. *Tullio*, 493 F.2d 371 (3rd Cir. 1974) 73

Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976) 38

Ford Motor Company v. *Huffman*, 345 U.S. 330 (1953).. 41

Franks v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 .....41, 48, 49

Fullilove v. *Kreps*, 584 F.2d 600 (2nd Cir. 1978), cert. granted, 99 S.Ct. 2403 (May 21, 1979) 61

Grigsby v. *North Mississippi Medical Center*, 586 F.2d 457 (5th Cir. 1978) 78

Hazelwood School District v. *United States*, 433 U.S. 299 (1977) 33, 36, 74, 75

Hirabayashi v. *United States*, 320 U.S. 81 (1943) 66

In re Griffiths, 413 U.S. 717 (1973) 67

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 49, 72, 73, 74

Page

Keyes v. *School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973) 78, 79

Kinsey v. *First Regional Securities, Inc.*, 557 F.2d 830 (D.C. Cir. 1977) 75

Kirkland v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), *cert. den.*, 429 U.S. 823 (1976) 45, 46, 74

Korematsu v. *United States*, 323 U.S. 214 (1944) 66

Kramer v. *Union School District*, 395 U.S. 621 (1969) 86

Land v. *Dollar*, 330 U.S. 731 (1947) 3

Loving v. *Virginia*, 388 U.S. 1 (1967) 67

Massachusetts v. *Westcott*, 431 U.S. 322 (1976) 59

McLaughlin v. *Florida*, 379 U.S. 184 (1964) 65, 67

Milliken v. *Bradley*, 418 U.S. 717 (1974) 70, 79, 83

Monroe v. *Board of Commissioners*, 391 U.S. 450 (1968) 85, 86

National League of Cities v. *Usery*, 426 U.S. 833 (1976) . 38

New York City Board of Education v. *Harris*, — U.S. —, 48 U.S.L.W. 4035 (Nov. 28, 1979) 52

New York City Transit Authority v. *Beazer*, 440 U.S. 568 (1979) 59, 72

Patterson v. *American Tobacco Co.*, 8 FEP Cases 778 (E.D. Va. 1974) 50

Patterson v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976), *cert. den.*, 429 U.S. 920 50

Perry v. *Sinderman*, 408 U.S. 593 (1972) 44

Personal Adm'n. of Massachusetts v. *Feeney*, 99 S.Ct. 2282 (1979) 62, 64, 77, 78

Page

Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978) ..... passim

Rizzo v. *Goode*, 423 U.S. 362 (1976) 79

San Antonio Independent School Dist. v. *Rodriguez*, 411 U.S. 1 (1973) 67

Schaefer v. *Tannian*, 394 F.Supp. 112 (E.D. Mich. 1974). 23

School District of Omaha v. *United States*, 433 U.S. 667 (1977) 78

Sipuel v. *Board of Regents*, 332 U.S. 631 (1948) 65

Smith v. *Board of Education of Morrillton School District No. 32*, 365 F.2d 770 (8th Cir. 1966) 85, 86

Snowden v. *Hughes*, 321 U.S. 1 (1944) 78

Soni v. *Trustees*, 513 F.2d 347 (6th Cir. 1975) 44

Spector Motor Co. v. *McLaughlin*, 323 U.S. 101 (1944) .. 59

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) 70, 79, 83, 86

Sweatt v. *Painter*, 339 U.S. 629 (1950) 65

Tatum v. *Mathews*, 541 F.2d 161 (6th Cir. 1976) 44

Thompson v. *McDonnell Douglas Corp.*, 416 F.Supp. 972 (E.D. Mo. 1976), *aff'd*, 522 F.2d 220 (8th Cir. 1977) 74, 75

Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977) 31

United States v. *City of Chicago*, 549 F.2d 415 (7th Cir. 1977), *cert. den., sub nom., Arado* v. *United States*, 434 U.S. 75 (1977) 78

United States v. *General Motors Corp.*, 323 U.S. 372 (1945) 3

Page

United States v. *Scotland Neck City Board of Education*, 407 U.S. 484 (1972) 85

United States v. *State of New Hampshire*, 539 F.2d 227 (1st Cir. 1976) 38

United Steelworkers of America v. *Weber*, — U.S. —, 99 S. Ct. 2721 (1979) .....passim

Usery v. *Allegheny County Institution District*, 544 F.2d 148 (3rd Cir. 1976) 38

Usery v. *Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977) 38

Uzzell v. *Friday*, 401 F.Supp. 775 (M.D.N.C. 1975) *Rev.d*, 547 F.2d 801 (4th Cir. 1977), *aff'd en banc*, 558 F.2d 727 (1977), *vac.* and *rem.*, 438 U.S. 912 (1978), *opinion on remand*, 591 F.2d 997 (1979) 31, 55, 57, 58, 59, 65, 66, 71

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 77, 78

Vulcan Society of N.Y.C. Fire Dept. v. *Civil Service Commission*, 490 F.2d 387 (2nd Cir. 1973) 73

Washington v. *Davis*, 426 U.S. 229 (1976) 77, 78, 80

Weber v. *Kaiser Aluminum Co.*, 563 F.2d 216 (5th Cir. 1977) *reversed, sub. nom., United Steelworkers of America* v. *Weber*, 99 S.Ct. 2721 (1979) 42

White v. *Carolina Paper Board Corp.*, 564 F.2d 1073 (4th Cir. 1977) 46

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 83

STATE CASES: Page

DPOA v. *City of Detroit*, 61 Mich. App. 487, 233 N.W. 2d (1975), *appeal denied*, 395 Mich. 756 (1975), *reh. denied*, 396 Mich 989 (1976) 15, 42

In re City of Detroit Police Dept., and Detroit Police Officer's Association, 9 Mich. Empl. Rel. Comm'n. Dec. 470 (1974) 42

CONSTITUTIONS:

U.S. Const. amend. V 52, 54, 60

U.S. Const. amend. XIV .....passim

Michigan Const. of 1963, Art. I, § 2 .....5, 6, 29

Michigan Const. of 1963, Art. XI, § 6 .....4, 29, 43

STATUTES:

Federal Statutes:

Emergency School Act of 1972, Pub.L. 92-318, 20 U.S.C. §§ 1601-1619 52

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1331 3

28 U.S.C. § 1343 3

Fair Labor Standards Act 29 U.S.C. § 201 *et seq.* 38

42 U.S.C. § 1981 .....3, 4, 5, 6, 7, 29, 30, 59

42 U.S.C. § 1983 .....4, 5, 6, 29

42 U.S.C. § 1985 .....5, 6, 29

Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d *et seq.* (1964) .....passim

Page

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.* (1964) ..... passim

42 U.S.C. § 3766 58

Public Works Employment Act of 1976, Pub. L. No. 95-28, 91 Stat. 116, 42 U.S.C. § 6701 *et seq.* 61

Michigan Statutes:

M.C.L.A. 7.2101 *et seq.* 6

M.C.L.A. 423.301 *et seq.* 5, 6

Municipal Ordinances:

Charter of the City of Detroit, art. VII, ch. 11, § 7-1114 ..... 4, 18, 42

Federal Regulations:

28 C.F.R. § 42.203 58

28 C.F.R. § 60-3.4(b) 69

MISCELLANEOUS:

Legislative History:

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) 41

H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971) 38

S. Rep. No. 415, 92d Cong., 1st Sess. (1971) 38

1964 U.S. Code Cong. & Ad. News 2391 41

1972 U.S. Code Cong. & Ad. News 2154 38

Page

Books:

A. Bickel, The Morality of Consent (1975) 88

Periodicals:

Burke and Chase, *Resolving the Seniority-Minority Lay-offs Conflict: An Employer-Targeted Approach*, 13 Harv. Civ. Rts. - Civ. Lib. L. Rev. 81 (1978) 51

Rostow, *The Japanese-American Cases - A Disaster*, 54 Yale L.J. 489 (1945) 66

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Detroit Police Officers Association,[1] and William Morgan, Brian Brunett and Donald Prince, individually and as representatives of a class, respectfully pray that a writ of Certiorari issue to review the decision rendered in this cause on October 12, 1979 by the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, decided and entered on October 12, 1979, is as yet unreported and appears in the appendix to this Petition at page 1a, et seq.[2] That decision reversed and remanded the Memorandum Opinion and Order of February 27, 1978 of the U.S. District Court for the Eastern District of Michigan, Southern Division, which is reported at 446 F.Supp. 979 (E.D. Mich. 1978), and appears in the appendix at page 41a, et seq.[3] The District Court had ruled for the Plaintiffs on issues of liability, and permanently enjoined the promotional practices of the City of Detroit's Police Department which are at issue in this litigation.

Previous orders include the order of the District Court on November 18, 1976 certifying the individual Plaintiffs' Request for Class Action, and the Order of the District Court of May 27, 1977 allowing Plaintiffs a Preliminary Injunction to restrain promotions, authorized pursuant to the City's promotional quota, based upon race.

On May 28, 1977, the U.S. Court of Appeals for the Sixth Circuit, per Judge George C. Edwards, ordered a stay of the District Court's Preliminary Injunction, pending appeal.

---

[1] The certified collective bargaining representative of all Detroit Police Department sworn personnel below the rank of sergeant.

[2] References to the Sixth Circuit's opinion, as reprinted in the appendix to this petition, are made as follows: (CA 1a, et seq.).

[3] References to the District Court opinion are made as follows: (DC 41a, et seq.).

The U.S. Court of Appeals for the Sixth Circuit, after oral argument, vacated the Preliminary Injunction on June 23, 1977, and directed that an immediate trial be held on the merits. The District Court's order of February 27, 1978 was issued after a trial in excess of 60 days.

JURISDICTION

The District Court's jurisdiction in this action arose, *inter alia,* through 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 2000e-5.

The order of the United States Court of Appeals for the Sixth Circuit was entered on October 12, 1979. This Petition for Writ of Certiorari was timely filed within ninety days thereafter.

This Court's jurisdiction arises under 28 U.S.C. § 1254(1).

The Sixth Circuit's order in this action reverses the District Court's findings of liability against Defendants with respect to claims brought under Title VI and Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The case was remanded for further consideration of the plaintiffs' claim under the Fourteenth Amendment under standards set forth by the Sixth Circuit. The permanent injunction was vacated.

While the order of the Sixth Circuit does not finally terminate the litigation, the opinion is dispositive of the significant claims brought by the plaintiffs under Title VII, Title VI and § 1981. Further, and as will be described in subsequent portions of this Petition, this case presents significant and clear cut issues of law fundamental to the further conduct of the case on the Fourteenth Amendment claims. Where such issues are presented that are "fundamental to the further conduct of the case", this Court may exercise jurisdiction under 28 U.S.C. § 1254(1), whether or not the Court of Appeals' order finally terminates the litigation. *United States* v. *General Motors Corporation,* 323 U.S. 372, 377 (1945); *See also Beacon Theaters, Inc.* v. *Westover,* 359 U.S. 500 (1959); *Land* v. *Dollar,* 330 U.S. 731, 734 n.2 (1947).

The Sixth Circuit's disposition of the Title VII, Title VI and § 1981 issues, and its standards for resolution of the Fourteenth Amendment issues, present the type of fundamental and significant questions which can best be resolved by this Court, before further proceedings below. Additional proceedings in the District Court, prior to review by this Court, would simply not be in the interest of judicial economy or serve the public interest.

QUESTIONS PRESENTED

1. Did the Court of Appeals Err In Finding that the City's Unilateral Imposition of a 50/50 Racial Quota In Place of a Bona Fide Merit System of Promotion Did Not Violate Title VII of the Civil Rights Act of 1964, as Amended in 1972?

2. Did the Court of Appeals Err in Finding that the City's Racial Quota for Promotions Did Not Violate Title VI of the Civil Rights Act of 1964?

3. Did the Court of Appeals Err in Reversing the District Court's Finding that the City's Racial Quota for Promotions Violated the Fourteenth Amendment of the United States Constitution?

4. Did the Court of Appeals Improperly Disregard and/or Set Aside Essential And Uncontradicted Findings of Fact in Reversing and Vacating the Order and Permanent Injunction of the District Court?

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant Constitutional provisions and statutes are: U.S. Const. Amend. XIV; 42 U.S.C. §§ 1981, 1983, 2000d-1, 2000d-3, 2000e-1 and 2000e-2, *et seq.*, Article XI, § 6 of the Michigan Constitution of 1963; Charter of the City of Detroit, Art. VII, Ch. 11, § 7-1114, all of which are set forth seriatim in the Appendix to this Petition beginning at page 107a.

STATEMENT OF THE CASE

I. HISTORY OF THE LITIGATION.

On June 10, 1974, Petitioners Detroit Police Officers Association (hereinafter referred to as the "Plaintiff" and the "DPOA") brought this action in the United States District Court for the Eastern District of Michigan. Named as Defendants were the Respondents City of Detroit, Mayor Coleman A. Young, The Board of Police Commissioners, its individual members, and the Chief of Police (hereinafter referred to as the "Defendants" and the "City"). The Complaint alleged that the Detroit Police Department's non-negotiated program of racial preference in promotions, adopted in July of 1974, passed over white officers seeking promotion to the rank of sergeant solely because of race. The DPOA alleged violations of 42 U.S.C. §§ 1981, 1983, 1985, 2000e and the Fourteenth Amendment.

On July 22, 1975, the individual Petitioners, William Morgan, Brian Brunett, and Donald Prince filed a class action against the Mayor, the Chief of Police, the members of the Detroit Board of Police Commissioners and the City of Detroit. This suit incorporated the DPOA's federal claims and further claimed violations of the Michigan Fair Employment Practices Act, M.C.L.A. 423.301 *et seq.*, and Article I, Section 2 of the Michigan Constitution. The action was assigned to the late Judge Fred W. Kaess. Judge Kaess denied Motions to Dismiss and for Summary Judgment (except as to the individual Plaintiffs' claim under 42 U.S.C. § 1985).

On November 18, 1976, Judge Kaess certified the individual Plaintiffs' Request for a Class Action and defined the class as follows:

> "All past, present and future qualified white Detroit Police Officers below the rank of Sergeant who, since April of 1974, have been or will be denied, because they are white, their timely promotions to the rank of Sergeant."

On March 23, 1977, the DPOA action was reassigned to Judge Kaess, and both actions were subsequently consolidated for trial. Thereafter, on May 4, 1977, the Plaintiffs sought a Preliminary Injunction to restrain promotions authorized pursuant to the City's voluntary racial preference program. Testimony on the motion was taken from May 25th through May 27th, 1977, when Judge Kaess entered an Order and Preliminary Injunction restraining further promotions under the racial preference program.

The City appealed the Preliminary Injunction to the Sixth Circuit and a Stay was issued by Judge Edwards on May 28, 1977. After oral argument, the Sixth Circuit vacated the Injunction on June 23, 1977, and directed that an immediate trial be held on the merits.

Trial commenced on August 8, 1977, before Judge Kaess and concluded with oral arguments on December 22, 1977. On October 21, 1977, Judge Kaess reinstated the claims of the individual Plaintiffs under § 1985(3) and the claims of the DPOA under Title VII of the Civil Rights Act of 1964. Judge Kaess further allowed Plaintiffs to amend their Complaints to include a claim under Title VI of the Civil Rights Act of 1964.

By Memorandum Opinion of February 27, 1978, Judge Kaess found that the City had violated the Plaintiffs' rights under 42 U.S.C. §§ 1981, 1983; 2000d *et seq.*, (Title VI); 2000e *et seq.*, (Title VII); the Fourteenth Amendment, Article I, § 2 of the Michigan Constitution of 1963; the Michigan Civil Rights Act of 1977, M.C.L.A. § 7.2101 *et seq.*; and the Michigan Fair Employment Practices Act, M.C.L.A. § 423.301 *et seq.* Judge Kaess entered an Order and Permanent Injunction which required Defendants to cease their discrimination on the basis of race and directed that future promotions be made in rank order as determined by the then current Sergeant's eligibility register. The issues of attorneys' fees, back pay, and other remedies were deferred to a future date.

On March 16, 1978, the City filed a Notice of Appeal. The U.S. Court of Appeals for the Sixth Circuit, on October

12, 1979, dismissed the plaintiffs' claims under Title VI, Title VII and § 1981. The case was remanded for further consideration of the Fourteenth Amendment issues, under standards set forth by the Court. (Slip Op. p. 39).

This Petition for Writ of Certiorari requests review of the judgment and order of the Court of Appeals of October 12, 1979.

II. FACTUAL BACKGROUND

The City's racial quota for promotions to the rank of sergeant was devised and implemented in 1974, pursuant to a policy unilaterally adopted by the City. The program was not negotiated by the City and the DPOA. The program was not ordered by any court. The program was not the subject of a consent judgment. No court gave the program its prior approval. Prior to the program's initiation, the City had made substantial and successful efforts to eliminate any potential for racial bias inherent in its recruiting, hiring or promotional practices. The catalyst of these concerted and extensive efforts was the tragic civil disturbance in Detroit in 1967, which generated great concern over the apparent hostility of segments of the Detroit populace toward the police force.

The unprecedented use in 1974 of a strict 50-50 racial quota by the City for promotions to the rank of sergeant must be examined in the context of the City's efforts since 1968 to eliminate all sources of discrimination in the Department's hiring and promotional processes.

A. The City's Recruiting Practices Prior to July, 1974.

At trial, the City introduced no proof regarding recruiting policies or practices for the years 1940-1968. No evidence was introduced regarding the number or percentage of black applicants during that time. Furthermore, no evidence was introduced by the City to show what the relevant labor market was during that time or the percentage of qualified blacks in

that market. Although the statistics introduced showed that from 1944 to 1968 the number of whites appointed far outdistanced the number of blacks appointed, the absence of reliable explanatory statistics precluded the District Court from drawing any inference of discrimination from those early statistics. (DC 66a-67a). The District Court declined to speculate regarding the City's hiring statistics, pointing out that the City, as the employer and alleged discriminator, was in the best position to gain access to any statistical evidence of discrimination. (DC 81a-82a).

The District Court was also unable to draw any conclusion of discrimination from hiring statistics for the years 1968-1975. Testimony revealed that the data base upon which the figures were derived was replete with errors in the reporting process, "seriously impairing any responsible analysis". (DC 67a). The District Court found the applicant flow records to be confusing and, "in many areas, incomprehensible". (DC 67a). The District Court's findings regarding post-1968 statistics were unrelated to its findings as to the appropriate labor market.

In contrast, the Sixth Circuit found that, "even standing alone, the statistical data was evidence of discrimination". (CA 19). The Sixth Circuit's description of the facts found by the District Court, however, is inaccurate. For example, the District Court did *not* reject the 1944 through 1968 data because of an insistence upon the Detroit standard metropolitan statistical area (SMSA) as the relevant labor market. (CA 18; DC 25). In other words, the Sixth Circuit overstated the District Court's evidentiary standards with respect to statistical evidence.

In contrast to the lack of evidence introduced with respect to recruiting practices from 1944-1968, there was a wealth of evidence as to post-1968 recruiting practices. In 1968, two groups, a mayor's task force and a police advisory committee (commonly known as the Vickery Committee) were formed. The Vickery Committee was comprised of prominent industrial

psychologists and personnel administrators. Commander Richard Caretti, whose qualifications as an expert in testing and personnel selection have never been disputed, was appointed as the Department's liaison to the Committee. One of the Committee's primary objectives was to develop methods of attracting qualified black candidates to the Department. (837a; 902a; 1217a-1218a; CA 4).[4]

In 1968 the City also launched a comprehensive campaign for black recruitment. (DC 65a). The stated policy of Commissioner Spreen, upon taking office on July 22, 1968, was to attract blacks as police officers. (697a). As Caretti testified at trial, the Department did everything possible to recruit blacks. (1142a.1-1143a). An advertising firm was hired to develop themes, design billboards, and create programs aimed at blacks. (705a, 728a). Recruiting vans were set up in black neighborhoods. Posters depicting black officers were circulated. (DC 24). A media campaign was undertaken. (766a). Churches, schools and public gatherings were visited. (705a, 762a, 763a). Inner-city recruiting offices were set up to create a more relaxed atmosphere than that of the "intimidating" police headquarters. (704a-705a, 1139-1142a). Black applicants were sought at colleges and universities throughout the state. (DC 24).

By January, 1970, black representation on the police force had doubled from 1967, without the erection of barriers preventing the appointment of white officers. (703a-706a).

The appointment of Commissioner John Nichols in 1970 heralded additional Departmental efforts to recruit blacks. (A29a). Those efforts included the appointment of a black recruiting director, Thomas Ferrebee, (796a-797a); an ex-

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[4] References to testimony or documentary evidence are to pages in the Appendix filed in the Sixth Cicuit, and forwarded to this Court as part of the record on appeal. The designation (837a) indicates page 837 of the testimony appendix. The designation (150b) indicates page 150 of the document appendix.

pansion of the recruiting budget, (796a); the formation of a steering committee whose ranks included the Urban League and the NAACP, (797a-798a, 904a); and the employment of a management-consultant firm to determine how to better attract black applicants. (1139a). The shortage of qualified black candidates in the City led to substantial recruiting efforts throughout the state. (763a, 764a, 787a, 788a, 789a, 789a.7, 1128a-1129a, 2144a, 2155a). Recruiting efforts also reached beyond the state to minority colleges and other police departments. (1131a). Many blacks were hired from outside the City. (2184a-2185a).

The progress made through these herculean recruiting efforts was significant. The Department deservedly considered itself "the nation's forerunner in this area". (Equal Employment Opportunity Plan, 616b, DC 66a). Accordingly, the Trial Court stated,

> "These efforts demonstrate, and this Court finds as fact, that from 1968 to the present date, the Department had made every possible effort to attract qualified black applicants." (DC 66a)

The Sixth Circuit failed to recognize the success of these recruiting efforts or the findings of the District Court with respect to the City's "affirmative" recruiting and hiring efforts.

The Sixth Circuit did, however, dispute the District Court's findings as to the relevant labor market for determining whether or not discriminatory hiring practices existed. The District Court found the relevant labor market to be the Detroit SMSA. (DC 61a-62a). The Sixth Circuit rejected that finding, relying in part, upon the City residency requirement in August 1974. In fact, the City's pre-application residency requirement was not adopted nor in effect prior to adoption of the racial quota challenged by the Plaintiffs. The residency requirement cannot be the basis for a "relevant labor market" comparison used to justify the quota.

B. The City's Hiring Practices Prior to July, 1974.

As society changed in the late 1960's, the standards and expectations of the Department also changed. (1290a). Prior to 1968, the City followed the "Chairman of the Board" theory, expecting every applicant hired by the Department to be qualified for advancement to the highest ranks. (1291a; 910a). In the 1960's, hiring standards focused on college education as a result of the President's Task Force Reports. This focus had an adverse impact on the less educated. (1291a). Between 1968 and 1971, a collective judgment was made by the City to abandon the "Chairman of the Board" approach. (1291a; 1536a). New hiring standards sought applicants capable of becoming good police officers without regard to promotional potential. (911a; 1293a; 1295a-1296a). These changes in expectation, as intended, opened the doors for new and differently qualified applicants. (1292a-1294a). As the record shows, the primary goal of these and other changes in hiring policies was intended to substantially increase minority presence in the department.

Beginning in 1968, the Vickery Committee and Caretti made a concerted effort to increase the success rate of black applicants at the entry level. (837a, 902a, 1217a-1218a, CA 4a). The hiring procedures were evaluated on an on-going basis, and significant adjustments were made to assist black applicants. The City endeavored to formulate selection procedures reflective of relevant job skills, which were free of cultural bias and disparate impact upon black applicants. (889a-890a; 841a).

Early in this process a twelve minute test was substituted for a one and one-half hour written segment of the entry level examination. (899a.3-899a.5, 1125a-1126a). The substitution resulted in an increase in black applicant success.

In 1971, John Furcon and the University of Chicago were retained to develop a new entry level testing battery to meet the City's affirmative action objectives. (797a; 1472a-1473a; DC 68a). In 1973, the Board's test (hereinafter referred to

as the "Furcon Test") was completed. Black and white applicants passed the Furcon Test at approximately the same rate. The Furcon Test eliminates any disparate impact upon black applicants, (CA 22a), through a race consicious differential regression equation scoring process, which applied two cut-off scores for the same test, based upon the candidate's race. (DC 69a; 907a; 1136a-1137a; 1235a; 2041a).

The City represented to the LEAA, in its Equal Employment Opportunity Plan, and claimed at trial, that the Furcon Test is criterion validated and is a valid predictor of a candidate's ability to do the job. (915a; 1136a; 1535a). At trial, however, a validation report was not produced, and Mr. Furcon was not called to testify. (DC 69a). In fact, experts Wollack and Ebel, psychometricians, testified that the race conscious scoring techniques invalidated the accuracy of the test. (1959a-1970a; 2036a-2043a).

C. The City's Promotional Practices Prior to July, 1974.

(1) The Evidence of "Job Assignment" Discrimination Is Inconclusive.

The City claimed that its past promotional practices discriminated against blacks. Yet the District Court found that prior promotional models and their application did not discriminate against blacks or any other class of individuals. This finding was based, in large part, upon the fact that the City introduced no evidence whatsoever regarding promotional models used prior to 1973. (DC 70a). Without specifically distinguishing these findings of the District Court, the Sixth Circuit inferred discrimination in past promotional practices by relying upon "uncontradicted evidence" of discriminatory practices in job assignments over the years. (CA 31a).

The record does not support the Sixth Circuit's characterization of that evidence as "uncontradicted." In fact, little or no evidence of discrimination in job assignments after the mid-

1960's was presented. Certainly, the record is barren of evidence of discrimination in job assignments subsequent to the application of Title VII to local government, in March of 1972.

Deputy Chief Bannon, who has been on the police force over thirty years and holds a Ph.D. in sociology, did testify that in 1949, there were black beats and white beats. (2351a). Bannon testified, however, that he could not state whether this was the result of policy, tradition, a lack of black personnel, or a desire to avoid mixing races. (2351a). Bannon recalled the hostitity between black and white officers in the mid-1960's, caused by the Department's integration of scout cars. (2351a-2352a). He attributed this hostility to widespread fears by blacks that white partners inhibited their actions in the black community. (2351a-2352a; 2355a).

On the other hand, Commissioner Nichols testified that there were many blacks over the years in specialized units, including robbery, vice, narcotics, and intelligence. (834a). This testimony was corroborated by the current Police Chief, William Hart, who is black. He testified that he was assigned to the Racket and Conspiracy Bureau from 1958 to 1970. (2269a).

Although Bannon could not state why blacks were not assigned white partners for many years, he explained that an unwritten policy existed which allowed officers to choose their own partners. Bannon denied this policy was the result of an intent to discriminate. (2355a; 2370a-2371a).

Robert Bullock, appointed to the department in 1949, testified that the same beats were, on occasion, walked by black and white officers. (2572a-2573a; 2585a). He denied that assignments were based on race. (2585a). Likewise, Bannon admitted that no job in a precinct was closed to black personnel by the mid 1960's, and that he knew of no institutional decision that had been made to discriminate based on race. (2369a). Bannon testified that there had always been opportunities for upward mobility in certain areas for black officers. As an example, blacks were detective captains as early as 1890.

(2354a). Commissioner Nichols confirmed that he never observed any incidents that prohibited upward mobility for blacks. (829a). Nichols further stated that seniority had always been a factor in the promotional process and that he had never seen documentation indicating that seniority discriminated on the basis of race. (859a).

The record does reflect that black officers, many of whom were Chief Hart's contemporaries at the patrolman level, and on cleanup squads and undercover beats, were promoted to higher ranks. (2330a-2331a, 2363a-2364a). In fact, since the mid-1960's, the Department has systematically attempted to promote minorities. (2365a). Jessie Stewart, a black male, testified that he became a detective on September 5, 1946 based upon a competitive examination and promotional model administered without regard to race. (2507a-2508a). He testified that the department never assigned him in ways that were different from those of his white counterparts while he was a sergeant. (2503a).

(2) Components of the Promotional Model.

In contrast to the ambiguous and contradicted evidence of past discrimination in job assignments, the record clearly demonstrates that from the years 1969 through 1976, the City, as it had done for hiring, made a substantial and successful effort to remove the impact of culture and race from the criteria used in promoting patrolmen to the rank of sergeant.

Promotions to the rank of sergeant have traditionally been based upon a weighted promotional model. In 1965 the model consisted of a written examination, service rating, seniority and veterans preference. In 1970, adjustments were made to the weight of the various factors and college education was added at a weight of two percent. (1233b).[5]

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[5] In 1971, both Commissioner Nichols and Commissioner Tannian refused the DPOA's request to bargain over the criteria for promotion

Just prior to the institution of a new written exam on December 16, 1973, the requirements for application for promotion to the rank of sergeant were dramatically altered. (30b-38b). In-grade service requirements were reduced with the intention of giving greater opportunity to those who had recently been hired, particularly blacks, many of whom had been hired since 1968. (795a; 855a-856a; 893a; 1055a; DC 49a). Other revisions designed to give greater opportunity to black officers were made. (42b; 1153a; 613b-615b; DC 8-9). In particular, the seniority component was reduced to minimize adverse impact upon recently hired blacks. (1267a; 620b-621b). The Oral Board was added in 1974 to measure factors not measured in other facets of the promotional model, and was designed to benefit those applicants who were not good test writers. (1107a; 1045a-1046a; 39b). These adjustments to the components of the promotional model were made in an attempt to devise a system that would be free of racial bias. (CA 4a).

(3) Creation of a Job Related Promotional Exam.

Beginning in 1969, Richard Caretti was given a charter by his superiors to develop a new promotional examination in compliance with existing federal testing guidelines, which would eliminate any barriers to the upward mobility of minorities in the Department. (DC 50a; 699a-702a).

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to the rank of sergeant. (1912a; 878a-879a; 1318a; 1548a-1549a). The DPOA filed an unfair labor practice charge with the Michigan Employment Relations Commission in December, 1972, regarding the City's refusal to bargain. (526b). On September 28, 1973, the administrative law judge ruled that the City had engaged in an unfair labor practice and required the City to bargain with the Union over promotional criteria. (538b-539b). In 1975, the Michigan Court of Appeals affirmed the administrative law judge's order. See *DPOA* v. *City of Detroit*, 61 Mich. App. 487, 233 N.W.2d 49 (1975), *leave to appeal denied*, 395 Mich. 756 (1975), *reh. denied*, 396 Mich. 989 (1976). Thereafter, in November of 1975, the City began to negotiate promotional criteria.

The Sixth Circuit suggests that the written examination, in its various forms prior to 1973, had an adverse impact on black candidates. The District Court, however, was unable to draw that conclusion in the absence of supporting evidence:

> "There was, however, no evidence presented showing what impact, if any, these examinations had upon either black or white candidates for promotion. As Commander Caretti related, *pass/fail rates by race were not recorded prior to 1973.*" (DC 50a). (Emphasis added).

Caretti's objective in preparing the 1973, 1974, and 1976 written examinations was to eliminate any existing racial bias, by making the examination as "content valid as possible". (DC 50a). In addition, Caretti was intent upon complying with existing federal testing guidelines. (DC 50a). The first step towards accomplishing Caretti's charter was to isolate and define the knowledge, skills and behavior required for satisfactory performance in the position of sergeant. (616b). A job analysis was prepared by Caretti and two outside experts, John Furcon in 1973 and Dr. Andres Inn in 1975. (1286b; 1010a-1011a; 1148a-1149a). Experts, inside and outside the Department, were used in preparing specific examination questions. In addition, the scoring of the 1973-1976 examinations were controlled and standardized; and new safeguards were instituted to protect the security of the process. Also, Caretti attempted to achieve a racially balanced staff in an effort to achieve input from both racial groups. (1050a; DC 51a).

The Sixth Circuit's discussion of the written examination component of the promotional model is confused. The promotional examination is referred to as the " 'Furcon exam which, like the 1973 entry exam, was developed at the University of Chicago." (CA 5a). As was explained by the District Court, Furcon had nothing to do with the writing of the promotional examination.[6] Furcon's only contribution was his collabora-

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[6] As noted earlier, the "Furcon Exam" was an entry level exam, not a promotional exam. (797a; 1472a-1473a; DC at 68a).

tion with Caretti in 1973, in conducting a job analysis and in preparing an entry level exam. (616b; 1136a-1138a).

Caretti testified at trial that, in his opinion, the December 16, 1973, November 17, 1974, and May 16, 1976 written promotional exams had been designed and constructed to achieve content validity and that they were job related. (107a; 1061a-1076a; 1121a). Phillip Tannian, who later instituted the promotional quota, asserted that the promotional examination was content valid (1459a) and among the best in the country. (1322a). Caretti testified that he was unaware of any alternative procedures for promotion which would remain job related and have less racial impact. (1047a).

The City represented the content validity of the exam in its EEO Program filed with the federal government, and asserted that it conformed with "standards mandated under Title VII of the Civil Rights Act of 1964, the Equal Opportunity Act of 1972, and the policy guidelines of LEAA and EEOC." (616b; 1324a-1325a; 1378a-1379a).

The expert testimony presented at trial by Dr. Stephen Wollack, a psychometrician, and Dr. Robert Ebel, confirmed that the 1973, 1974 and 1976 exams were fully job related and content valid. (1948a; 1957a; 1984a; 1986a; 2015a-2022a; 2024a; 2074a; 2075a). In addition, Dr. Wollack stated that he found nothing in the exams which would have discriminatory impact upon any racial group. (2026a.1). His opinion was that any apparent racial impact of the promotional examination was due to the low standards for acceptance at the entry level. (2074a).

(4) Cumulative Effect of the Promotional Model.

Before implementation of a racial quota for promotions in July, 1974, the City's practice was to place the names of eligible officers on a promotional register ranked in descending order, based upon composite scores determined from all components of the model. The first name was that of the officer

attaining the highest composite score. Positions on the register were referred to as "merited" positions. Pursuant to a Department Personnel Order, promotions were made in the order of position on the eligibility register, starting at the top of the list.

Dr. Ebel testified that, based upon the various components of the promotional model, the higher ranking officers had better demonstrated a recognized and measurable probability of job success than lower ranked officers. (1956a; 1957a). Dr. Wollack agreed. (2027a-2030a; 3021a; 2072a; 2073a; 2077a). Commissioner Spreen testified that rank order measured the individual capabilities of each officer, and that the number one officer was better qualified to perform the duties of sergeant than a lower ranking officer. (700a; 717a; 741a-743a; 758a). Commissioner Nichols and Commander Caretti corroborated Spreen's testimony. (799a-800a; 809a; 820a; 844a; 862a; 863a; 1184a; 1299a).

The long standing practice of promoting in rank order was carried over into the administration of Police Commissioner Phillip Tannian.[7] (35b). (DC 58a). The 1973 exam resulted in an eligibility register for sergeant which was designated as Personnel Order No. 74-108 and listed 298 names. (1b). (DC at 43a-44a). On April 17, 1974, Commissioner Tannian issued Personnel Order No. 74-121 which indicated that promotional candidates from Order No. 74-108 would be selected in the order of their position on their roster. (420b; 1331a). On May 9, 1974, the first 30 promotions were made from Order No. 74-

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[7] The practice of promotion by rank order was confirmed in the new City Charter, effective on July 1, 1974. Section 7-1114 of the Charter provided that:

> "No person who has taken an examination and has been placed on a register of employees eligible for promotion may be passed over in favor of an employee with a lower examination score unless the Chief of Police files with the Board and Division of Police Personnel written reasons acceptable to the Board. Any person having been passed over may appeal to the Board." Charter of the City of Detroit, art. 7, ch. 11, § 7-1114.

108 in rank order. (DC 44a). (5b; 1331a-1332a). These 30 promotions had consisted of 29 white officers and one black officer.

Thereafter, Commissioner Tannian departed from the rank order system by issuing Personnel Order No. 74-191 on June 7, 1974, which deleted the reference to rank order promotions in Personnel Order No. 74-121. (421b; 1333a-1334a). (DC 44a-45a). The issuance of this order signalled the commencement of the Defendants' 50-50 promotional quota.

D. The Creation Of The Promotional Quota.

(1) The Appointment of Philip G. Tannian as Commissioner of Police by Mayor Coleman A. Young.

Philip Tannian was first appointed to the position of Police Commissioner in September, 1973, by then-Mayor Roman Gribbs, (1302a) in the midst of a mayoral election campaign. (1302a). Defendant Coleman A. Young campaigned in that race on a pledge that the racial composition of the City's work force would reflect that of the City's population. (2377a-2378a; 1439a-1440a). Mr. Tannian was fully aware of the mayor's political commitment to reflect in the Police Department the racial composition of the community. (1440a). After Mr. Young's victory, Tannian had a series of discussions with the Mayor from November, 1973 through the Spring of 1974. One topic discussed was the racial complexion of the Department. (1441a). Tannian was reappointed as Commissioner of Police by the new Mayor in January, 1974. (1314a). Simultaneously, Tannian adopted as a priority the implementation of a 50/50 racial hiring policy, as well as a 50/50 promotional policy for personnel above the rank of lieutenant. (1315a-1316a).

In fact, Tannian testified that, as of January 1, 1974 (the commencement of Mr. Young's tenure as Mayor), his objective

was that the racial composition of the Police Department reflect that of the city.[8] This remained his position until his termination in September of 1976. (1315a-1317a). The 50/50 quota was based upon the prevailing racial balance in the City's general population. (1388a; 1418a).

Although the Circuit Court credits the Board of Police Commissioners (BPC) with the creation of the affirmative action policy, the evidence is to the contrary. For example, the Department's policy decisions of June 7, 1974, predate even the formation of the BPC. It was in the course of their meetings from November 1973 through the Spring of 1974 that Young and Tannian committed themselves to the adoption of an affirmative action plan designed to satisfy the Mayor's campaign promises. (DC 58a-59a).

A major obstacle to the fulfillment of Mayor Young's political obligation was the City's own racially neutral promotional model, which placed considerations of ability ahead of race in selecting new sergeants for the Department.

After the initial thirty officers were promoted by Personnel Order 74-160, Mayor Young expressed his displeasure with the racial makeup of the new sergeant class. (1333a; 1439a). This resulted in discussions between Tannian and the Mayor regarding a 50/50 promotional policy for the rank of sergeant. (2053a). (DC 58a).

(2) Hearings Before The Board of Police Commissioners.

The new Charter for the City of Detroit, effective July 1, 1974, vested final authority for police promotions with the newly appointed Board of Police Commissioners (BPC). (1243b).

The first major item of business for the new Board was the Mayor's proposal for "affirmative action". (DC at 59a). The Board met to discuss the proposal on July 22, 26 and 31, 1974.

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[8] Commissioner Littlejohn also shared this objective. (2428a).

(2399a; 2400a-2402a). In his presentation, Tannian identified certain "mandates for affirmative action" and referred to certain graphs and charts purporting to show the historical hiring patterns by race of the Detroit Police Department, comparing them to city population demographics.[9] (DC at 59a-60a).

A second meeting was held on July 26, 1974 before an audience of approximately 50 to 100 people. (1339a-1342a). At this hearing, "witnesses" attempted to relate past experiences of Departmental discrimination. Yet, neither Tannian nor the Board attempted to verify the incidents described by members of the audience. (1343a-1345a; 2401a-2404a). The statements were not taken under oath. (1243b). Commissioner Littlejohn admitted that the BPC did not sit as a body and evaluate the testimony. (2401a-2404a; 1343a-1345a). In fact, this public hearing was no more than window dressing, orchestrated to support a decision already made.

There was no effort by Tannian or the Board to determine whether the black officers who would be preferentially promoted had ever been discriminated against by the Department. (1352a; 1161a-1163a; 2440a-2441a). Further, there were no findings by the Michigan Civil Rights Commission, the EEOC, or the LEAA, let alone a court, that the City had ever discriminated against minorities.[10] (1546a.1; 2469a.1).

On July 31, 1974, the BPC passed its first affirmative action resolution declaring the existence of "*de facto* discrimination" in the hiring and promotional practices of the Department. (186b; 2399a-2400a). It called for promotions on a 50/50 racial basis, creating separate black and white lists where once there had been a single eligibility register. (1389a; 2406a; 2441a; 2320a; 2469a). The resolution had no numerical or time

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[9] Tannian later admitted that the Michigan Civil Rights Commission Guidelines, which he presented to the BPC, referred to relevant labor market rather than general population data. (2048a-2049a).

[10] The only written legal opinion obtained by the Board was the memorandum of Mr. James Andary, counsel for the City at trial. (2426a-2427a; 2438a-2439a; 897b; 2469a.1, 2476a).

limitation. (1458a). Nor, did it mention the operational needs of the Department. (1463a-1465a).[11]

The District Court found there was no evidence before the Board to justify the conclusion that the City had engaged in employment discrimination against minority applicants and personnel. Instead, the Board had before it a politically charged program sponsored by the Mayor and supported only by the unsubstantiated "mandates" offered by Mr. Tannian. (DC 64a).

The District Court examined in detail the factual basis upon which the affirmative action resolution was adopted by the BPC, determining that the Board relied heavily upon the statistics presented by Tannian to show "*de facto* discrimination". The District Court was troubled by this presentation because no labor market statistics or analyses were presented to the BPC. (DC 61a). Other factors relied upon by Tannian and accepted by the BPC as indications of adverse impact were the performance evaluation and seniority components of the promotional model. The District Court analyzed those factors and found that "neither of these component parts of the promotional process curtailed the promotional opportunity of blacks or in any way discriminated against them." (DC 62a).

What Tannian did *not* present to the BPC was also pointed out by the District Court. Specifically, the BPC was not aware of Richard Caretti's studies for the City showing that service ratings had *no* adverse racial impact. (1461a; 696b). Further, no information was provided to the BPC concerning seniority provisions in the collective bargaining agreement. (DC 63a). Tannian also failed to mention to the BPC at subsequent meetings that the Equal Employment Opportunity Plan which the Department submitted to the LEAA represented that neither the service ratings nor the seniority component adversely affected minorities. (DC 64a).

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[11] Subsequent resolutions made no reference to operational needs justifying a racial quota (2284a).

In discrediting the BPC's Findings, the District Court commented on Tannian's presentation of the facts of *Schaefer* v. *Tannian*, 394 F.Supp. 112 (Ed. Mich. 1974), a suit involving sex discrimination in the Detroit Police Department and establishing limited preferential hiring. The District Court found that Tannian, "a lawyer and party to the Schaefer action, intentionally misrepresented the significance of the decision to the BPC." (DC 64-65a).

Based upon its assessment of the testimony and exhibits before it, the District Court found that:

> ". . . Tannian neglected to paint the full picture in his presentations to the board regarding these factors and that the BPC failed to fulfill their duty to investigate the factual matters as presented by Tannian." (DC 64a).

E. Promotions From Personnel Order No. 74-108.

A total of 150 promotions were made from Personnel Order No. 74-108, which ranked 298 candidates after the December 16, 1973 promotional examination. (2045a). Following the initial 30 promotions made in rank order, (10/14/77, Vol. II, p. 28), on August 1, 1974 (one day after passage of the affirmative action resolution), the Department promoted 27 blacks and 3 white females, supposedly to counter-balance the rank order promotions made in April. (2405a-2406a; 1b & 6b). (DC 44a). The 25 black males promoted ranked from #36 to #264 on the eligibity register. (DC 45a). Thereafter, Personnel Order No. 74-108 was extended by Personnel Order Nos. 74-193 and 75-6, (5b-6b), because there were no more black officers on the original eligibility register. (1268a; 1391 a-1393a). Only black officers were promoted from the extended group of rankings. (1268a).

The District Court found that:

> "The true reason why the eligibility register was extended was to have more black male officers available for

promotion since the prior promotions had exhausted all eligible black male candidates. (DC at 46a).

Promotions made after August 1, 1974 were made pursuant to a 50/50 racial quota – with the top ranking blacks and the top ranking whites taken in equal numbers. The District Court found that: "There were, in actuality, two lists, one for white males and one for black males." (DC at 45a).

The last white officer promoted on Personnel Order No. 74-108 and its extensions was ranked No. 81 and the last black male officer promoted was ranked No. 494. (1179a). As a result, 58 identifiable white officers, ranked from 81 to 150, were passed over for promotion because of their race.

Each member of the Plaintiff Class who was passed over for promotion received a letter by Departmental mail, which stated that:

> *"In an effort to create racial balance among supervisory personnel* . . . the DPD . . . adopted an affirmative action plan on July 31, 1974. Implementation of the affirmative action plan caused your name to be 'passed over' on the promotional list for sergeants." (Personnel Order No. 74-221). (427b; 1397a-1398a, 1424a). (Emphasis added).

Under Order No. 74-108, 150 officers were promoted to the rank of sergeant. Tannian admitted that, after these promotions, he could no longer continue his racial preference program since only 500 officers had passed the December 16, 1973 examination and *all* blacks on the resulting register had been promoted. Further promotions from the current register would have necessarily been of white males already passed over. (2047a). As an alternative to promoting these eligible white officers, the existing register was abandoned by the City and a new test was administered on November 17, 1974. (DC 47a).

F. Promotions from Personnel Order No. 75-352 and No. 76-441.

To provide the Department with more black candidates for Sergeant, a new promotional exam was noticed on September 10, 1974. (39b-45b). The notice deleted previous language stating that promotions would occur in rank order. (39b-45b; DC at 47a).

The new eligibility register for promotions to sergeant was designated as Personnel Order No. 75-352, and was predicated on the November 17, 1974 promotional exam. (14b-20b; DC at 48a). A total of 127 promotions were made from that register. (21b-23b; 1185a-1187a).

As found by the District Court:

> "As with the 1974-1975 promotions, the process of selecting officers to be promoted was not by true or strict numerical rank but was in fact done by coding the eligibility register by race a d sex and then, in a descending order, selecting an equal number of black males and white males from each group." (DC at 47a). (1188a-1190a).

The last white male to be promoted on the 1974 register was ranked as No. 70, but the last black promoted under the preferential quota was ranked as No. 342. (1189a; 1191a; 1193a-1195a). Under Order No. 75-352, 49 white police officers were passed over for promotion because of their race. (1189a-1192a; 1420a-1423a).

On December 28, 1976, Chief William Hart issued a new eligibility register for sergeant, designated as Personnel Order No. 76-441, which arose from the May 23, 1976 exam. (24b-29b). A total of 70 promotions were later made from that register by Order No. 77-279, broken down as follows: 30 white males, 30 black males, 5 black females, 5 white females. (742b; 2074a.1). The last black promoted was No. 116, and the last white promoted was No. 42. (1199a). From this Order, 19 white officers were passed over solely because of their race. (2320a, 2324a; 1466a; 2464a; 2359a). (DC 48a).

G. The City's Defense Of Operational Needs.

At trial and on appeal, the City claimed that its affirmative action plan was justified by the operational needs of the Police Department for the employment and promotion of greater numbers of blacks. The District Court found the operational needs justification to be unsupported by any competent evidence. (DC 74-75a). The Sixth Circuit cited several reports and studies on the relationship between government and citizens in finding that the District Court gave too little consideration to the testimony of certain officers that increased black representation on the police force was required. Neither that testimony, however, nor the non-record reports and studies cited by the Sixth Circuit relate to an operational need for black *sergeants*. Assuming *arguendo*, that the City did show an operational need for black representation on the police force, there was simply no showing that this need was relevant to sergeants as well as patrolmen.

Tannian did testify at trial that blacks were needed for surveillance of black gambling and narcotics operations. (1531a). Tannian, however, did not deny that white officers had done surveillance in black neighborhoods, often with the same results as black officers. (2059a). Deputy Chief Bannon also admitted that, in some cases, white officers could work effectively with black informants. (2342a-2343a). Chief Hart testified that, prior to July 1974, black officers below the rank of sergeant had been used as plain clothes investigators, and that the Department could conduct plain clothes investigations with personnel other than sergeants by transferring officers from precincts to investigative units. (2302a-2303a). This testimony was confirmed by Robert Bullock, who stated that black officers could be transferred to investigative units, regardless of rank. He also testified that he never had problems getting sufficient black officers for special tasks. (2588a-2589a).

Chief Hart and Deputy Chief Bannon testified that professional standards complaints by citizens had decreased after

implementation of the quota. (2277a, 2328a, 2367a-2368a). Contrary to the City's argument, a study revealed that citizen complaints actually *rose* in 1975. (2436a-2347a). Furthermore, a study entitled, "Citizen's Complaints of Police Misconduct from January, 1975 to June, 1976" (1241b-1242b) indicated that a number of reasons could account for any reduction in complaints, since during that time period: (1) officers violating Department rules were charged and disciplined appropriately; (2) Department members were made more aware of their duties and responsibilities relative to citizen inquiries; and (3) each member of the Department was notified that violations of the law or regulations would not be tolerated. (1241b-1241b.1; 2437a.1).

The City has also claimed that increased black representation on the police force was necessary for more effective crime prevention and solution. (CA 36a). No evidence presented at trial, however, related this laudable goal to a fixed quota for the promotion of black sergeants. In fact, the record indicated that many factors could cause a reduction in crime, including, but not limited to: (1) population size and density; (2) demographics relative to age, sex and race; (3) economic conditions; (4) relative stability of population; (5) seasonal weather conditions; (6) educational, recreational and religious characteristics of the community; (7) effective strength of the police department; (8) standards governing appointment to the police department; (9) public attitudes; and, (10) administrative and investigative efficiency. (2310a-2311a). It is important to note that in June of 1974, when use of the quota began, there was an increase in all major crime in Detroit (1506a); and there were more major crimes in 1976 than in 1974. (2309a).

Chief Hart admitted that a major reason for the reduction in crime claimed by the City for 1977 and 1978, was an increase in the overall manpower strength of the Department. (2314a). According to Chief Hart, previous escalations in the crime rate had been caused by the declining strength of the Department from 1973 through 1976 due to budget con-

straints.[12] (2314a; 2318a; 2313a; 2332a). In addition, Chief Hart admitted that when economic conditions improve, crime goes down. (2319a). Finally, Chief Hart admitted that the population in Detroit had decreased since 1970. (2307a-2308a). The record, therefore, established several potential causes for the decrease in crime, and, the City offered no proof to tie the claimed reduction in crime to racial quotas.

In discussing the City's "operational needs", the Sixth Circuit stated that "effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police" (CA 36a). Certainly, the District Court did not deny the truth of that statement in its opinion. The District Court did find that the City had introduced no *evidence* which related the City's purported operational need for increasing the number of black sergeants to a strict racial quota which denied promotions to better qualified white police officers.

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[12] As crime was escalating in 1974 and 1975, the Department's strength was declining. (2318a). In 1975, budget constraints prevented the Department from filling vacancies. (2313a). On or about June 30, 1976, budget constraints required the Department to lay off 972 police officers. (2313a; 2332a). These officers were recalled in September of 1976 and crime statistics began to decrease in October of 1976 or immediately thereafter. (2314a; 2332a). The effective strength of the Department changed, in the following manner, from the years 1973 through 1977:

1973 - 5,541	1976 - 5,052
1974 - 5,383	1977 - 5,643
1975 - 5,458	

(2317a-2318a; 1234b, 1235b).

REASONS FOR GRANTING THE WRIT

This Petition arises from the use of a 50-50 racial quota by a government body, the City of Detroit, for promotions to the rank of Sergeant by the Detroit Police Department. That quota was grafted onto a bona fide, job-related and non-discriminatory promotional model which ranked candidates based upon relative qualifications for the position of sergeant.

As a result of the racial quota, better qualified white officers were passed over for promotion solely because of their race.

On June 10, 1974 Plaintiffs instituted this suit, alleging that the City of Detroit's unilaterally imposed racial quota, adopted in July of 1974, improperly abrogated a merit system of promotion mandated by City Charter and the Michigan Constitution, and denied certain white officers promotions solely because of race. Plaintiffs have alleged violations of 42 U.S.C. §§ 1981, 1983, 1985, 2000e, 2000d and the Fourteenth Amendment.

After 66 days of trial, the District Court, on February 27, 1978, entered its Order and Permanent Injunction restraining the Respondents' use of a racial quota instead of a merit system of promotion. The District Court found that the promotional examinations given on December 16, 1973, November 17, 1974 and May 16, 1976 and the other components of the promotional model were job related, non-discriminatory and content valid. (DC 52a). The District Court further found that the unrebutted testimony established that "the higher a candidate stood on the eligibility register, the better qualified and equipped he was to assume the position of Sergeant." (DC 58a).

The District Court also rejected the City's defense that alleged past discrimination against minorities justified placing the burden of its "remedy" upon individual white candidates for promotion. (DC 91-94a). Finally, the District Court concluded that Respondents had failed, as a matter of proof,

to establish that the racial quota had somehow improved the effectiveness of the Detroit Police Department. (DC 73-75a).

By decision of October 12, 1979, the Sixth Circuit vacated the Injunction; dismissed Plaintiffs' claims under 42 U.S.C. §§ 1981, 2000d and 2000e; and remanded the Fourteenth Amendment claim to the District Court for consideration under standards of constitutional review set forth by four justices in *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 324 (1978) (Opinion of Brennan, White, Marshall and Blackmun). The Sixth Circuit found as one justification for the racial quota "the public's perception of law enforcement officials and institutions." (CA 36a).

However, in reaching its conclusion, the Sixth Circuit never reversed or modified the factual findings of the District Court that: (1) the promotional examination, since at least 1973, was job related and non-discriminatory; or (2) that "the higher a candidate stood on the eligibility register the better qualified and equipped he was to assume the position of Sergeant". (CA 7a).

Indeed, the Sixth Circuit indicated "that job related, non-discriminatory examinations for Sergeant were instituted in 1973 . . .". (CA 38a).

Therefore, in upholding the City's racial quota for promotions, the Sixth Circuit was able to identify discrimination against minorities only in hiring and job assignment, but not in past promotional practices.

Considering the record evidence, and the findings of the District Court, the Sixth Circuit has committed significant errors of constitutional dimensions. And its decision will have ramifications far beyond those that affect the parties to this litigation. The Sixth Circuit's ruling came shortly after this Court's decisions in *Board of Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978), and *United Steelworkers of America* v. *Weber,* 99 S.Ct. 2721 (1979). The misconstruction of those decisions by the Sixth Circuit will influence the review of affirmative action plans under Title VII,

Title VI, and the Fourteenth Amendment by the federal courts, affecting millions of workers in both the public and the private sector.

The Sixth Circuit's ruling has also created conflicts of significant dimensions with opinions of other Circuits on these issues, including that of the Tenth Circuit in *EEOC* v. *Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979); that of the Second Circuit in *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2nd Cir. 1973), *cert. den.*, 421 U.S. 991 (1975), and cases following that opinion; and that of the Fourth Circuit in *Uzzell* v. *Friday*, 591 F.2d 997 (4th Cir. 1979).

For these reasons, and the reasons that follow, Petitioners respectfully request that this Honorable Court grant its Petition for Writ of Certiorari and reverse the October 12, 1979 decision of the Sixth Circuit.

I. THE COURT OF APPEALS ERRED IN FINDING THAT THE CITY'S UNILATERAL IMPOSITION OF A STRICT RACIAL QUOTA IN PLACE OF A BONA FIDE MERIT SYSTEM OF PROMOTION DID NOT VIOLATE TITLE VII.

In seeking to justify its dismissal of the Title VII claim,[13] the Sixth Circuit apparently found that there "was evidence of post-Act discrimination" since an unvalidated entry-level examination was not abandoned until 1973 (CA at 22a) and "changes in other aspects of the entry-level hiring processes which had racially disparate effects or afforded opportunities for discrimination continued until 1973." (CA at 22a).

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[13] Section 703(a) of The Equal Employment Opportunity Act of 1972 (the 1972 Act) bars discrimination against an individual in employment "because of such individual's race. . . ." 42 U.S.C. § 2000e-2(a)(1).

The prohibition of § 703(a) applies "[R]egardless of whether the discrimination is directed against majorities or minorities." *See Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

The Sixth Circuit further justified its dismissal of Petitioners' Title VII claim, by relying upon this Court's decision in *Weber, supra,* finding that the Court's interpretation of Title VII in *Weber* applied equally to public and private employment. (CA at 23a, n.7).

The Sixth Circuit's dismissal of the Title VII claim was error in at least three respects. First, unrebutted evidence, when properly applied to the applicable law, leads to the inevitable conclusion that no post-Title VII discrimination occurred in the Detroit Police Department. Moreover, the Sixth Circuit improperly applied this Court's decision in *Weber* to public employment. Third, the Sixth Circuit improperly found the City's racial quota to be a "reasonable" remedy under Title VII despite overwhelming evidence that the quota unnecessarily violated the rights of white police officers.

A. The Sixth Circuit Erred In Finding Post-Act Discrimination.

It is significant that the Sixth Circuit has referred only to past discrimination in *hiring* and has found no past discrimination in promotions from the rank of police officer to the rank of sergeant. Indeed, the Sixth Circuit did not disturb the findings of the District Court that the promotional examinations of 1974, 1975 and 1976 were job related, content valid and non-discriminatory. (CA 38a). Moreover, the City offered no evidence to show the effect on minorities of promotional examinations or other promotional criteria prior to 1973.[14]

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[14] Admittedly, the Sixth Circuit found that "in 1968 the written promotional exam, like the entry-level test, was essentially an intelligence test which principally gauged verbal ability." (CA at 5). This finding of the Sixth Circuit finds no support in the record. Commander Richard Caretti testified that he did not know how the promotional examination was developed prior to 1969. (1238a). Caretti further affirmed that he never conducted a study to determine whether or not the promotional examinations, prior to 1969, were discriminatory. He never

In finding post-Act hiring discrimination, the Sixth Circuit disregarded the Court's statement in *Hazelwood School District* v. *United States*, 433 U.S. 299, 309-310, n.15 (1977):

> "An employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, *particularly where relevant aspects of a decision making process had undergone little change.*" (Emphasis supplied)

Indeed, the Sixth Circuit ignored its own findings that, since July of 1967, the Detroit Police Department had adopted radical and continued changes in its hiring procedures in order to eliminate all requirements irrelevant to police work and to improve minority representation on the force. (CA 3-4a).[15]

Further, the Sixth Circuit never identified what it described as the "other aspects of the entry-level hiring process which had racially disparate effects" (CA 22a). The "other aspects" actually considered in the entry-level hiring process were preliminary screening, criminal record check, background investigation, medical examination, and oral boards. Clearly, the preliminary screening process, which included age, height, weight, education, vision, residence and traffic record had no discriminatory impact on black applicants since 1968. (2186a-2193a). Further, the criminal record requirement, which applied equally to all candidates, was not shown to have had a disparate impact. Moreover, the background investigation was required to be racially neutral as far back as the 1960's;

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examined or studied any of the prior examinations. (1239a-1240a). Caretti stated that his only knowledge of such prior procedures was obtained from the single promotional examination that he took in approximately 1960. (1242a).

[15] The extensive revisions in entry-level hiring requirements, including the written examination, are fully set forth *infra* at pp. 7-12.

and credit ratings and undocumented rejections were de-emphasized prior to 1973. (559b; 770a; 1225a; 1226a-1228a). The City did not claim in the lower courts that the oral board, which was last changed in 1971, had a racially discriminatory impact. (2140a-2141a).

The unrebutted evidence refutes the Sixth Circuit's reliance upon unidentified "aspects of the entry-level hiring process which had racially disparate effects," as justification for the promotional quota. (CA 22a). In addition to refuting any finding of post-Act discrimination in hiring, the record establishes that the "relevant aspects of the decision making process" for both entry and promotion had undergone radical change since 1968.

The Sixth Circuit's only specific finding of post-Act hiring discrimination related to the entry level exam. "[I]t was not until 1973 that the unvalidated entry level exam which failed greater numbers of black than white applicants was finally abandoned." (CA 22a). Yet the Court disregards the efforts of the City to alter that impact, both by changes in the test, and by the use of a racial preference for black applicants that eliminated any adverse impact from the test.

The development of a non-discriminatory entry-level examination was a process that began in 1968, with the goal of eliminating any disparate impact on minorities. *Infra* pp. 7-9. (CA 3-5a). Any adverse impact of the entry-level exam after 1968 was counteracted by the use of an entry-level racial quota under which *all* eligible black applicants were routinely hired. Only surplus police academy spaces were filled with white applicants. (2181a-2183a; 2237a-2249a).

The elimination of discrimination at the entry level after adoption of Title VII is confirmed by an examination of the percentage hiring rates of black applicants as compared to the SMSA and the Detroit Labor Markets:[16]

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[16] A discussion of the Sixth Circuit's errors in reversing the District Court's determination of the "relevant labor market" is addressed at

Percentage of Blacks Hired[17]	Percentage of Blacks in SMSA[18]	Percentage of Blacks in Detroit[19]
1972 – 30%	16.4	35.1
1973 – 30%	16.6[20]	36.0
1974 – 48%		36.0
1975 – 64%		37.0
1976[21] –		38.9
1977 – 80%		

Whether the Court considers Detroit or Metropolitan statistics, for purposes of comparison since 1972, black applicants have been hired by the Department at rates far in excess of their representation in the labor market since 1972.

The Sixth Circuit's refusal to consider these post-Act hiring statistics to refute claims of Title VII discrimination against minorities conflicts with the standard previously enunciated by the Tenth Circuit Court of Appeals in *Equal Employment Opportunity Commission* v. *Navajo Refining Company,* 593 F.2d 988 (10th Cir. 1979). In that case, a high school education requirement and an aptitude test had a discriminatory impact upon Spanish surnamed Americans. The evidence further established that Spanish surnamed Americans received 38% of the new entry-level hiring positions. Their represen-

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pp. 72-75, *infra.* However, for the above mentioned analysis, the use of either labor market establishes beyond question that there was no post-Act hiring discrimination.

[17] Exhibit 269 (1236b).

[18] Exhibit 242, Table 2 (1349b); % of blacks in relevant SMSA labor market.

[19] Exhibit 242, Table 1 (1348b); % of blacks in relevant Detroit labor market.

[20] 1778a. Limited to the City of Detroit as of 1974 due to the introduction of the pre-residency requirement.

[21] The Detroit Police Department did not hire any officers in 1976 because of a shortage of funds.

tation in the relevant labor market was 23.2%. In finding no unlawful discrimination, the Tenth Circuit stated:

> "The high school education requirement and the tests are racially neutral on their face, although they have not been shown to be job related. '*But Congress directed the thrust of the Act to the consequences,* of employment practices, . . .' *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed. 2d 158 (1971). The statute [Title VII] prohibits discrimination on 'race, color, religion, sex, or national origin' grounds only. 42 U.S.C. § 2000e-2(a). Thus, *the Company is free to use its tests and high school education requirements if the result is not discrimination in fact.* When 30% of the applicants for jobs are SSA's, from a workforce in the community of 23.2% SSA's, and 38% of the persons hired by Navajo (all of whom start at the same job level) are SSA's, the requirement of proof of discrimination is not met." (emphasis supplied) 593 F.2d at 992.

The Sixth Circuit found post-Act entry level discrimination, despite the statstical evidence that blacks were not underrepresented in hiring since 1972. This finding was clearly erroneous. See *Hazelwood, supra.*

B. The Sixth Circuit Erred in Applying Weber To The Public Sector.

In *Weber,* "the question for decision [was] whether . . . Title VII of the Civil Rights Act of 1964 . . . left employers and unions *in the private sector* free to take such race-conscious steps necessary to eliminate manifest racial imbalance in traditionally segregated job categories". 99 S.Ct. at 2724-2725. (Emphasis added). The Court expressly noted that: "since the Kaiser-USWA plan does not involve state action, [the] case does not present an alleged violation of the Equal Protection Clause of the Constitution." 99 S.Ct. at 2726. Thus, in *Weber,* this court specifically limited its holding to the area of private, rather than public employment.

In holding that the collectively bargained affirmative action plan was permissive voluntary affirmative action, the court relied, in part, on the express language of 703(j) of Title VII, 43 U.S.C. § 2000e-2(j). According to a majority of the Court in *Weber*, "the section does not state that 'nothing in Title VII shall be interpreted to permit' voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action". 99 S.Ct. at 2726.

The same result should not arise when the Court rules on the constitutionality of promotional quotas in the public sector. Real and substantial differences of constitutional significance exist between public and private sector employment. Different standards of review for public sector employment under Title VII are required.

Almost a century ago, this Court held that private citizens ordinarily are free to discriminate on the basis of race. *See Civil Rights Cases*, 109 U.S. 3 (1883). In 1964, Congress acknowledged the need to regulate discrimination by private employers, pursuant to the Commerce clause, and enacted Title VII of the Civil Rights Act of 1964. Absent the limitation contained in § 703(a) of Title VII, a private employer was still left free to discriminate based on race. Thus, a majority of this Court in *Weber* read § 703(j) as not prohibiting the use of race-conscious affirmative relief.

Distinguishing Title VII's private sector mandate from Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (interpreted by the Court in *Bakke, supra*) the Court found in *Weber* that:

> "Title VII, by contrast, was enacted pursuant to the Commerce power to regulate purely *private decisionmaking* and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read in *pari materia*." 99 S.Ct. at 2729, n.6. (Emphasis added).

The application of Title VII to state and local government derives from a totally different constitutional basis. In 1972, Title VII was amended to include the public employers expressly exempted in 1964. See Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e(a)(f) (1970e (d), Supp. IV). The congressional debates unequivocally indicate that the 1972 amendments, unlike the original Act, were enacted under the authority of the Fourteenth Amendment.[22] Recent decisions of this Court confirm this view. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 453 (1976).

The appellate courts have consistently upheld the 1972 amendments, as well as similar legislation directed to governmental units, upon the authority of the Fourteenth Amendment.[23] Reliance on the comerce power would clearly be inappropriate in light of this Court's holding in *National League of Cities* v. *Usery*, 426 U.S. 833, 851 (1976). There, the extension of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, to local governments was held invalid under the Commerce clause.

The 1972 amendments to Title VII were premised solely on the Fourteenth Amendment. Title VII, therefore, should be construed, at the least, to incorporate and particularize the commands of the Fourteenth Amendment. The Statute and Constitution must be construed consistently with one

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[22] § 5 of the Fourteenth Amendment provides as follows: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article." *See* Legislative History, 1972 *U.S. Code Cong. & Ad. News* 2154; H.R.Rep. No. 238, 92d Cong., 1st Sess., 19 (1971); S. Rep. No. 415, 92d Cong., 1st Sess., 24 n.11 (1971).

[23] See *United States* v. *State of New Hampshire*, 539 F.2d 227 (1st Cir. 1976), *cert. den.*, 429 U.S. 1023 (1976). Cf. *Usery* v. *Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977) (Equal Pay Act. 29 U.S.C. § 206(d)); *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (3rd Cir. 1976) (Equal Pay Act); *Marshall* v. *Owensboro-Davies County Hospital*, 581 F.2d 116 (6th Cir. 1978) (Equal Pay Act); *Arritt* v. *Grisell*, 567 F.2d 1267 (4th Cir. 1977) (Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*).

another; further, Title VII's prohibitions extend not only to conduct prohibited by the Fourteenth Amendment but also to conduct included within the natural meaning of the statute.

Title VII's public sector provisions should also be read *in pari materia* with Title VI, also grounded in the Fourteenth Amendment, and under whose absolute prohibition "it is not 'permissible to say "yes" to one person but to say "no" to another person, only because of the color of his skin.'" *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 418 (1978) (Opinion of Stevens, J.).

Clearly, the relationship of Title VII to the Fourteenth Amendment demands that Title VII be read, at a minimum, to prohibit all employment discrimination by public employers prohibited by the Fourteenth Amendment. Since this Court's decision in *Weber, supra,* was specifically limited to private sector employment, the Sixth Circuit's unquestioning application of the *Weber* doctrine to public employment was clearly erroneous.

C. The Sixth Circuit Erred In Declining To Find The City's Quota To Be An Unreasonable Remedy For Past Discrimination.

Conceding, *arguendo,* the existence of past discrimination in hiring and the applicability of *Weber,* the Court of Appeals erred in failing to find the City's absolute racial quota unreasonable.

In *Weber,* the Court did not "define in detail the line of demarcation between permissible and impermissible affirmative action plans." 99 S.Ct. at 2730. The *Weber* opinion, however, did note that the Kaiser-USWA plan was reasonable since "the plan [did] not necessarily trammel the interest of the white employees" and was "not intended to maintain racial balance . . .". 99 S.Ct. at 2730.

Throughout the *Weber* opinion, the Court noted that the plan was collectively bargained between the Union and the

employer. This case does not arise from a voluntarily negotiated, affirmative action program.

At a minimum, any affirmative action program must be measured by the following standards of reasonableness. First, the plan should be negotiated between employer and any recognized union. Such negotiations would ensure that the plan's benefits and burdens, to the extent possible, are shared equally by all parties. Second, any racial preference, which abrogates a bona fide merit promotional system must be considered *per se* unreasonable when it damages a group of identifiable, existing employees.[24] Third, the plan may not merely shift the burden of the remedy from the employer-wrongdoer to innocent employees.

(1) The Non-Negotiated Abolition Of A Bona Fide Merit Promotional System Renders The Quota, Per Se, Unreasonable.

Weber involved "the legality of an affirmative action plan — *collectively bargained* by an employer and the union . . . ." 99 S.Ct. 2724. (Emphasis added). In reviewing the legislative history of Title VII, the Court found that the statute must be read in light of "Congress' desire to avoid undue federal regulation of private business," 99 S.Ct. at 2729, and thereby preserving the traditional give-and-take afforded to the collective bargaining process.

This Court recognized in *Weber* that legislators who traditionally resisted federal regulation of private business demanded as a price for their support of the 1964 Civil Rights Act that 'management prerogatives and union freedoms . . . .

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[24] Section 701(h) of Title VII extends a measure of protection to "merit systems" since it provides in part that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide . . . merit system . . . provided that such differences are not the result of an intention to discriminate because of race. . . ." 42 U.S.C. § 2000e-2(h).

be left undisturbed to the greatest extent possible." H.R.Rep. No. 914, 88th Cong., 1st Sess., Pt. 2 (1963), at 29, 1964, *U.S. Code Cong. & Admin. News*, p. 2391. 99 S.Ct. at 2729. As a consequence, Title VII was designed to "create an atmosphere conducive to voluntary or local resolution" of problems caused by discrimination, H.R. Rep. No. 914, *supra*, at 18, and to act as a:

> "spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'. *Albemarle* v. *Moody*, 422 U.S. 405, 418 (1975)." 99 S.Ct. at 2728.

The racial preference program upheld in *Weber*, was voluntarily established pursuant to a collective bargaining agreement between Kaiser and The United Steelworkers of America. The program affected seniority rights, themselves a product of collective bargaining.[25] The Court has consistently held that union and management could modify the existing seniority rights of employees through collective bargaining agreements. See *Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953); *Franks* v. *Bowman Transportation Company*, 424 U.S. 747, 778-779 (1976).

In contrast, the City's program was not the product of collective bargaining but was designed by the City and periodically changed, unilaterally, throughout the course of the litigation. Plaintiffs were systematically denied a voice in the formulation of the discriminatory program that affected them

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[25] Justice Blackmun, in his concurring opinion, disagreed and noted that: "Seniority is not an issue because the craft training is new and does not involve an abrogation of pre-existing seniority rights." 99 S.Ct. at 2734. In the instant case, there can be no question that the city's racial quota was enacted by virtue of a unilateral abrogation of a bona fide merit system.

so adversely. The City absolutely refused to bargain with the DPOA regarding standards and criteria for promotions. Ultimately the DPOA filed an unfair labor practice charge against the City before the Michigan Employment Relations Commission. The Commission unanimously ordered the City to cease and desist from engaging in this unfair labor practice.[26] The Michigan Court of Appeals unanimously affirmed the Commission's finding of an unfair labor practice, *Detroit Police Officers Association* v. *City of Detroit,* 61 Mich. App. 487, 233 N.W.2d 49 (1975), *appeal denied,* 395 Mich. 756 (1975).

Unlike *Weber,* therefore, the City's racial quota was not the result of arms-length, good-faith collective bargaining. The DPOA did not have the opportunity, as did the USWA, to protect the interests of its members and to obtain negotiated benefits in return for certain contractual modifications.

In *Weber,* the union obtained a *new* benefit for *all* employees in the form of a craft apprenticeship program. Prior to the negotiation of that provision, all untrained employees, both black and white, had been unable to obtain skilled craft positions. Through the collective bargaining process, the union required the employer to grant a benefit to *all* employees in return for the modification of the seniority provision.[27]

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[26] See *In re City of Detroit, Police Dept., and Detroit Police Officers Association,* 9 Mich. Empl. Rel. Comm'n., Dec. 470 (1974). (526b).

[27] Judge Wisdom, in his dissent in *Weber* v. *Kaiser Aluminum and Chemical Corp.,* 563 F.2d 216 (5th Cir. 1977), explained the significance of the bargaining process and the new benefit obtained for all employees:

> "In the instant case entirely new rights were created by the plan. None of the white or black employees affected by this proposal had any chance to receive craft training from Kaiser before the 1974 Agreement. Only those workers with prior experience had been eligible for training, and that pool had been exhausted. No white workers lost their jobs, none had expectations disappointed. Instead, the defendants created an entirely new expectations for all the employees, without harming the chances of any Kaiser employer for such training." 563 F.2d at 234.

In this case, the racial quota did not create new expectations or new opportunities for all employees. Rather, the expectation of promotion was rooted in the City Charter and in the established past practice of the Department of rank order promotions.

The City's willful obstructive and systematic exclusion of the DPOA from the process of altering an established promotional system distinguishes *Weber* and mandates a finding that the City's quota is *per se* unreasonable.

(2) The City's Racial Quota Unnecessarily Trammels The Rights Of White Officers Seeking Promotion.

Although the Court, in *Weber*, ruled that Title VII did not preclude voluntarily negotiated affirmative action programs *in the private sector*, the Court did not leave employers and unions with unlimited discretion. In assessing the validity of the plan challenged in *Weber*, the Court noted: "At the same time the plan does not unnecesarily trammel the interests of the white employees." 99 S.Ct. at 2730.

In *Weber* the right of all employees to an apprenticeship program was created and governed by the collective bargaining agreement. The right to promotion in the Detroit Police Department, is regulated by the Michigan Constitution and the Charter of the City of Detroit. Pursuant to Article XI, § 6 of the Michigan Constitution of 1963,[28] the Charter, effective July 1, 1974, provides that promotions within the Department, through rank of lieutenant, shall be made on the basis of competitive examinations and that:

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[28] "By ordinance or resolution of its governing body which shall not take affect until approved by a majority of the electors voting thereon, unless otherwise provided by Charter, each county, township, city, village, school district and other governmental unit or authority may establish, modify or discontinue a merit system for its employees other than teachers under contract or tenure." Mich. Const. Art. II, § 6.

> "No person who has taken an examination and has been placed on a register of employees eligible for promotion may be passed over in favor of an employee with a lower examination score unless the Chief of Police files with the Board and the Division of Police Personnel written reasons acceptable to the Board. Any person having been passed over may appeal to the Board."[29]

This provision created a vested entitlement to promotion, based upon the rank order of candidates on the promotional register.[30]

Under virtually identical circumstances, numerous appellate courts have refused to allow the denial of promotions due to readily identifiable employees solely because of a racial preference for other candidates. The Sixth Circuit's opinion is clearly in conflict with those authorities.

In *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973), *cert. den.,* 421 U.S. 991 (1975), black patrolmen sought to restrain the

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[29] The Sixth Circuit also affirmed the finding of the District Court that "prior to July, 1974 all promotions to Sergeant were made in strict numerical order from the eligibility list." (CA 6a)

[30] In *Board of Regents* v. *Roth,* the Supreme Court held that:

> Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . . 408 U.S. 564, 577 (1972).

In a companion case, the court held that although "subjective expectancies" do not create property rights, those rights do attach when expectations are predicated upon objective evidence of de facto policies, rules or other understandings, officially promulgated and fostered. *Perry* v. *Sindermann,* 408 U.S. 593 (1972). The Sixth Circuit has repeatedly applied *Roth* and *Sindermann* in employment cases requiring due process protection of property rights which flow from objectively reasonable expectations. *See, e.g., Tatum* v. *Mathews,* 541 F.2d 161 (6th Cir. 1976); *Soni* v. *Trustees,* 513 F.2d 347 (6th Cir. 1975).

City's discriminatory employment practices. The District Court imposed hiring and promotional quotas. The Second Circuit, in reversing the promotional quota, first noted that, as in this case, there was no finding "that the promotional examination is not job-related." 482 F.2d at 1341.[31]

In reversing the promotional quota, the Second Circuit noted the effect on innocent white employees:

> "[T]he imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes. (Citations omitted). We see no purpose in curing a past mischief by imposing a new one which is deliberately tainted." 482 F.2d at 1341.

In *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), *cert. den.,* 429 U.S. 823 (1976), the Second Circuit again refused to affirm a promotional quota which denied promotions to law enforcement officers solely because of their race:

> "A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the Court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be bypassed for advancement solely because they are white." 520 F.2d at 429.

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[31] In this case, the District Court expressly found that the promotional model was job-related. (DC 52a). The Sixth Circuit further found that "job-related, non-discriminatory examinations for sergeant were instituted in 1973 . . ." (CA 38a).

The Second Circuit reaffirmed its prior decisions in *Kirkland* and *Bridgeport Guardians* in *Chance* v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. den.*, 431 U.S. 965 (1977). In *Chance*, the "excessing" rules under the New York Education Law and the collective bargaining agreement, provided that when a position in a school system was eliminated, the least senior employee in the job classification would be transferred, demoted, or terminated. Despite an undisturbed finding that the promotional examination involved was *not* job-related, the Second Circuit set aside a racial quota for "excessing" due to its effect on a readily identifiable group of employees in a promotional context:

> "Moreover, the concern which we expressed in *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), about the 'bumping' effect of a quota 'upon a small number of readily identifiable' individuals finds equal cause for expression in the situation which now confronts us. We are advised that in some of the school districts employees will be excessed from groups containing as few as two or three persons. To require a senior, experienced white member of such a group to stand aside and forego the seniority benefits guaranteed him by the New York Education Law and his union contracts, solely because a younger, less experienced member is Black or Puerto Rican is constitutionally forbidden reverse discrimination." 534 F.2d at 998-999.

That promotional quotas should be judged under standards different than entry level quotas, was recognized in *White* v. *Carolina Paper Board Corp.*, 564 F.2d 1073 (4th Cir. 1977), where the Fourth Circuit unanimously invalidated a promotional quota. The District Court, after a specific finding of promotional discrimination, had ordered that 25% of future promotions be awarded to minorities. The Fourth Circuit reversed, recognized the effect of a quota on existing employees, and specifically relying on *Bridgeport Guardians, supra.*

In its October 12, 1979 decision, the Sixth Circuit virtually ignored these decisions of the Second and Fourth Circuits, which exhibited a judicial sensitivity towards those denied merit promotions under a racial quota. As matters presently stand, the Sixth Circuit, without supporting rationale, has departed from settled appellate precedent established by the Second and Fourth Circuits. This conflict among the Circuits must be resolved by the Court.

In *Weber* a new benefit was created through collective bargaining and no previous expectation was destroyed. In this case, both the City Charter and past practice established an absolute expectation that individual employees would be promoted according to rank order as determined by job related, racially neutral criteria. This legitimate expectation has been denied to certain identified white employees for the sole purpose of accomodating a political promise of racial balance. Such a result in inherently unreasonable and violative of the Plaintiffs' Title VII rights.

(3) The City's Racial Quota Unreasonably Foisted The Economic And Social Burdens Of Its Own Wrongdoing Upon The Plaintiffs.

The City has attempted to "confess" past discrimination against blacks. In attempting to provide a remedy, however, the entire burden of its alleged wrongdoing has been unreasonably foisted upon individual white officers.[32] The Sixth Circuit failed to recognize the City's failure to fairly allocate

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[32] Indeed, some Plaintiffs have been so burdened on more than one occasion. Officers Gerald B. Barba, William C. Gratopp, Michael C. Saad, Carter A. Hicks, Robert C. Morris, Wayne M. Parlowe, William F. Birdseye, Robert S. Rachas, Bruce B. Balmas and Leonard Stano have been passed over on two occasions. Kenneth F. Schill has been passed over on three occasions.

the benefits and burdens of its alleged wrongdoing. (CA 26a, 39a).

A plan is inherently unreasonable when the white candidates passed over bear the entire burden of the employer's alleged wrongful conduct. The Plaintiffs themselves are entitled to a remedy, to include promotion, retroactive seniority, and back-pay. *See Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). At the least, the white officers would be entitled to a monetary remedy if promotion is impossible due to the City's alleged past mischief.

In *Franks* v. *Bowman Transportation Co., Inc., supra,* a majority of the Court held that minority employees who had personally suffered *post-Act discrimination* could be awarded retroactive seniority even if this tended to disadvantage white employees with higher seniority.

Chief Justice Burger, in his concurring and dissenting opinion in *Franks*, confirmed that innocent employees may not be required to carry the burden of the employer's past wrongdoing:

> *"[A]lthough retroactive benefit-type seniority relief may sometimes be appropriate and equitable, competitive type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning.* More equitable would be a monetary award to the persons suffering the discrimination. An award such as 'front pay' could replace the need for competitive type seniority relief. Such monetary relief would serve the dual purpose of deterring wrongdoing by the employer or union – or both – as well as protecting the rights of the innocent employees. In every respect an innocent employee is comparable to a 'holder-in-due-course' of negotiable paper or a bona fide purchaser of property without notice of any defect in the seller's title. In this setting, I cannot join in judicial approval of 'robbing Peter to pay Paul.'

> "I would stress that the Court today does not foreclose claims of employees who might be injured by this holding from securing equitable relief on their own behalf." 424 U.S. at 780-81. (Emphasis added).

Justice Powell, also rendered a dissenting opinion in *Franks*, joined by Chief Justice Burger and Justice Rehnquist, noting:

> "[C]ompetitive seniority benefits, as the term implies, directly implicate the rights and expectations of perfectly innocent employees. The economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers . . . (who) are not the wrongdoers, who have no claim to the Chancelor's conscience, but rather are innocent third parties." 424 U.S. at 788-89.

Whether one reads the majority opinion by Justice Brennan, the concuring and dissenting opinion of Chief Justice Burger, or the dissenting opinion of Justice Powell, the inescapable conclusion is that it is patently unreasonable to require innocent white employees to bear the *entire* burden of an employer's alleged past discrimination.[33]

The rationale of *Franks* is even more compelling, in this case, since the findings of both lower courts establish that the passed-over white officers: (1) were better qualified to perform the duties of sergeant as shown by a merit system; (2) had expended a minimum of two years service before being allowed to sit for promotion; (3) had attained their rank order based under a nondiscriminatory, job-related promotional

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[33] The same concerns expressed in *Franks* were embraced by a strong majority of the Court in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 372 (1977). The Court, in remanding the formulation of a remedy to the district court, stated:

> Moreover, after the victims have been identified and their rightful place determined, the district court will again be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing. 431 U.S. at 372.

model; and (4) would have been promoted pursuant to City Charter and state constitution but for race. Given these facts, the City may not be allowed to "rob Peter to pay Paul" by paying for its alleged wrongdoing to minorities at the sole expense of the careers of the individual white officers. These considerations render the City's plan unreasonable, even under *Weber*.

In other instances, courts have burdened the employer, rather than either group of employees, by establishing one worker's right to a particular position and requiring the corporation to pay the other worker the wage that would have been received had he or she been placed in that position. In *Patterson* v. *American Tobacco Co.*, 8 FEP Cases 778 (E.D. Va. 1974), the District Court required the displacement of incumbents in favor of discriminatees, but ordered that both groups receive the higher rate of pay. The Fourth Circuit reversed, but merely reversed the positions, ordering that the incumbents be retained in the higher positions and that "the discriminatee receive a higher level of pay." See *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976), *cert. den.*, 429 U.S. 920 (1976).

A plan that requires innocent employees to bear the burden of the employer's alleged past wrongdoing violates essential principles of justice and equity, and fosters racial hostility among the employer's work force. These social consequences were recently described as follows:

> "Such a result creates anger and resentment that is likely to be directed at those whom whites perceive to be the beneficiaries to their misfortune – the minority workers retained on the job. The displacement remedy, then, exacerbates minority-majority tensions which are already explosive, especially in the blue collar neighborhoods that experience industrial slow downs accutely. Put differently, displacements of whites lend credence to the idea that majority-minority interests are inherently opposed . . . while insulating the employer, it pits majority against minority labor interests, stoking the fires of anti-union

> sentiment as well as sexism and racism. That the courts have adopted this as the most viable alternative is inexcusable; that civil rights and union advocates have permitted themselves to be placed in this alignment is inexplicable."[34]

Thus, even if *Weber* is to be applied on the same terms to public employers, the City's racial quota is, *per se,* unreasonable since: (1) it was unilaterally implemented by the employer without negotiations and with no safeguards for the rights of innocent employees; (2) it replaced a job related merit system, passing over higher ranked and better qualified candidates for promotion, solely on grounds of race; (3) it placed the entire burden of past alleged discrimination upon innocent employees rather than upon the wrongdoing employer; and (4) it was adopted without time limit or goal other than the maintenance of a strict 50-50 racial balance.

II. THE COURT OF APPEALS ERRED IN DISMISSING PLAINTIFFS' CLAIM UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

The District Court found, prior to this Court's decision in *Bakke, supra,* that the City's promotional quota violated the flat prohibition against racial discrimination contained in Title VI, 42 U.S.C. § 2000d *et seq.*:

> "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving federal financial assistance."[35]

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[34] See *Burke and Chase,* "Resolving The Seniority-Minority Lay-offs Conflict: An Employer-Targeted Approach," 13 *Harv. Civ. Rts. - Civ. Lib. L.Rev.* 81, 94, 116 (1978).

[35] The record evidence reveals, and the District Court found, that: (1) the Detroit Police Department, since at least 1973, received sub-

The Sixth Circuit reversed the District Court's finding of a Title VI violation and dismissed Plaintiffs' claim under that statute. (CA 39a). The basis for the Court's dismissal, was that: "the validity of the affirmative action plan under Title VI thus turns on whether it was effected to comply with the constitutional duty to remedy prior discrimination." (CA 27a).[36]

The Sixth Circuit's opinion, in this regard, is incongruous: the Court dismissed the Title VI claim but remanded the claim under the Fourteenth Amendment. If the Sixth Circuit believed that Title VI and the Fourteenth Amendment were co-

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stantial federal funds from the Law Enforcement Assistance Administration, the Comprehensive Employment Training Act, and the Equal Employment Act; (982b-1113b; 2319a.1-2319a.2) and that (2) these funds were used for the salaries of officers at all levels, including sergeant. (2319a1-2319a2). These findings were not reversed by the Sixth Circuit in its October 12, 1979 opinion.

[36] The Sixth Circuit, in its opinion, apparently reads Title VI *in pari materia* with the Fourteenth Amendment. Admittedly, in *Bakke*, it appeared that at least five justices entertained the belief that Title VI was co-extensive with the racial discrimination prohibition contained in the Equal Protection Clause of the Fourteenth Amendment. *Regents of the University of California* v. *Bakke*, 438 U.S. 265 at 289 (1978) (Opinion of Powell, J.); 438 U.S. at 325 (Opinion of Brennan, White, Marshall and Blackmun). In *Weber*, the majority opinion also appeared to indicate that Title VI was "intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." 99 S.Ct. at 2729, n. 6. However, in *New York City Board of Education* v. *Harris*, — U.S. —; 48 U.S.L.W. 4035 (Nov. 28, 1979), the Court, in interpretating the Emergency School Act of 1972, Pub. L. 92-318, 20 U.S.C. § 1601-1619, indicated that: "Thus there is no need here for the Court to be concerned with the issue of whether Title VI of the Civil Rights Act of 1964 incorporates the constitutional standard." 48 U.S.L.W. at 4040. However, the dissenting opinion, written by Justice Stewart, and signed by Mr. Justice Powell and Mr. Justice Rehnquist, indicated that "Title VI, which prohibits discrimination in federally funded programs, prohibits only discrimination violative of the Fifth Amendment and the Equal Protection Clause of the Fourteenth." 48 U.S.L.W. at 4043. Therefore, there seems to exist at least some doubt as to whether or not Title VI totally incorporates the standards of the Equal Protection Clause of the Fourteenth Amendment.

extensive, both the Title VI and the Fourteenth Amendment claims should have been remanded together. In fact, the Sixth Circuit failed to properly analyze the City's racial quota in light of the express non-discrimination provision contained in 42 U.S.C. § 2000d *et seq.*

A. The Sixth Circuit's View Of The Title VI Claim Is Contrary To The Majority View in Bakke.

The application of Title VI to a racial quota denying whites equal opportunity was considered by this Court in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). In that case, the University of California Medical School had a regular admissions program and a special admissions program. Under the regular admissions program, candidates were given a composite score which included college grade point, grade point in science courses, scores on the MCAT test, letters of recommendation, activities and biographical data. 438 U.S. at 274. A grade cut-off score of 2.5% was also applied. *Id.* The special admissions program considered special candidates who could not meet the 2.5 cut-off score. The preferential admissions program admitted eight minority applicants out of the 50 student class in 1973 and 1974. 438 U.S. at 275. The minority applicants were admitted with grade point averages, MCAT scores and benchmark scores significanctly lower than Bakke's. 438 U.S. at 277.

An opinion authored by Justice Stevens and signed by Justices Rehnquist and Stewart, and Chief Justice Burger, specifically held that the preferential admissions policy deprived Bakke of his rights under Title VI. After reviewing the legislative history of Title VI, Justice Stevens concluded that Congress' "answer to the problem of federal funding of segregated facilities stands as a broad prohibition against the exclusion of *any* individual from a federally funded program 'on the ground of race'." 438 U.S. at 413.

Justice Stevens then indicated that Title VI emphasizes individual rights rather than class-based rights:

> "[T]itle VI . . . express[es] Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of *individual* equality, without regard to race or religion, was one on which there could be a 'meeting of the minds' among all races and a common national purpose . . . . this same principal of *individual* fairness is embodied in Title VI." 438 U.S. at 416-17, n.19 (citations omitted).

Justice Stevens concluded that the preferential admissions policy violated the racial prohibition contained in 42 U.S.C. § 2000d:

> "In short, nothing in the legislative history justifies the conclusion that the broad language of § 601 should not be given its natural meaning.
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> • • •
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> "In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race. As succinctly phrased during the Senate Debate under Title VI it is not 'permissible to say "yes" to one person, but to say "no" to another person, only because of the color of his skin.'" 438 U.S. at 418.

In a separate opinion, Justice Powell stated that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment." 438 U.S. at 287. Justice Powell then proceeded to hold that the preferential admissions program, as presently constituted, violated the Equal Protection Clause and, thereby, Title VI. 438 U.S. at 319-20.

Contrary to the decision of the Sixth Circuit on October 12, 1979, five members of this Court have specifically held that Title VI prohibits the denial of an equal opportunity to a white person by a federally funded enterprise solely because of race.

The City's racial quota, which reserved 50% of all promotions to black officers, solely because of their race, is far more

invidious than the quota struck down in *Bakke*. First, *Bakke* dealt with one applicant seeking entry to a medical school. In this case, the City's racial quota has deprived 112 readily identified white officers of timely promotions to the rank of sergeant.

The District Court found that these higher ranking officers were better qualified to perform at the rank of sergeant. (CA 7-8a). The Sixth Circuit did not disturb that finding. The years in service, the competition of a job-related promotional examination and the justified expectation of an equal promotional opportunity pursuant to a merit system mandated by City Charter establishes a deprivation of rights far greater than that involved in *Bakke*. Yet as in *Bakke*, the racial quota was not designed, intended or enacted to redress *individual* acts of discrimination against any specific minority candidates. As in *Bakke*, the effect of the racial quota is to isolate white police officers from competition with their fellow black officers for at least 50% of the promotional vacancies.

Bakke stands as clear precedent for the district court's ruling that the City's racial quota violates Title VI; the Sixth Circuit's decision stands in flat contravention of *Bakke*.[37]

B. The Sixth Circuit Interpretation Of Title VI Is Contrary To The Fourth Circuit's Opinion In Uzzell v. Friday.

The Fourth Circuit recently had an occasion to interpret *Bakke* in *Uzzell* v. *Friday*, 401 F.Supp. 775 (M.D.N.C. 1975), *Rev'd*, 547 F.2d 801 (4th Cir. 1977), *aff'd en banc*, 558 F.2d 727 (4th Cir. 1977), *vac.* and *rem.*, 438 U.S. 912 (1978), *opinion on remand*, 591 F.2d 997 (4th Cir. 1979). *Uzzell* involved the legality under Title VI and the Fourteenth Amendment of regulations of the University of North Carolina

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[37] That conclusion finds extensive support in the legislative history surrounding the congressional debates in enacting Title VI. *See Bakke*, 438 U.S. at 414-18.

which required that (1) two representatives of minority race be on the student senate; and (2) that four of the seven judges of a University Honor Court be of the same race as the accused. The District Court dismissed the case under Title VI and the Fourteenth Amendment, for failure to state a claim. 410 F.Supp. at 779-782.

The Fourth Circuit not only reversed the dismissal but granted summary judgment in favor of the Plaintiff. 547 F.2d at 805. The ruling of the Fourth Circuit was affirmed, *en banc,* 558 F.2d at 727. In light of this Court's decision in *Bakke, supra,* this Court remanded the case to the Fourth Circuit. 438 U.S. 912 (1978).

Upon remand, the Fourth Circuit affirmed its prior finding that the University's regulations, based solely on race, violated Title VI:

> "*Bakke,* we recognize, unequivocally announces that in State educational institutions race may be a consideration in fixing the rights of students but at no stage did the Court affirm that race could be the sole determinant in any such adjustment. 438 U.S. 265, 98 S. Ct. 2733. As Mr. Justice Powell put it for the majority:
>
> > 'When a classification denies an individual opportunities or benefits enjoyed by others *solely* because of his race or ethnic background, it must be regarded as suspect. (Emphasis added).'" 591 F.2d at 998.

The Fourth Circuit held that the University's reliance solely on racial criteria violated Title VI, as well as the Fourteenth Amendment:

> "The permeating defect in the organization of CGC, the governing council, is the imposition of an artificial racial structure upon this selective body that bars nonminority students from eligibility for appointment to the Council. This resort to race affronts *Bakke.* Although the regulation in question seeks to provide 'protective representation', its effect is to establish a racial classification, as

> it relates exclusively on race to preclude non-minority students from enjoying opportunities and benefits available to others." 591 F.2d at 998.

The Fourth Circuit reasoned that, even under *Bakke*, evidence of past discrimination would not justify the university's policy of racial preference:

> "There is no justification for appellees' insistence that the cause be remanded to the District Court to take additional evidence that, they assert, reflects prior discriminaiton at the University, or depicts the regulations as an effort by the University to develop a 'diverse student body' or to achieve other related aims. *Bakke* suggests that racial preferences may be approved upon the finding of a continuing Constitutional or statutory violation, *as long as others are not prejudiced by the remedial course adopted.* 438 U.S. 265, 98 S.Ct. 2733. The method here chosen for eradicating possible earlier discrimination could not be accepted, even if history revealed such conduct, because, as we have seen, *the supposedly remedial measures presently enforced impinge upon the rights of others.*" 591 F.2d at 999-1000. (Emphasis added).

As in *Uzzell*, the City's racial quota makes race the sole determinant factor for at least 50% of promotions to the rank of sergeant. The quota precludes white officers from competing for 50% of any promotions to the position of sergeant. On the other hand, no limitation has been placed upon black candidates.[38] The City's quota creates an artificial racial structure which reserves a precise number of promotional positions to black officers. As in *Uzzell*, race is the determining

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[38] Indeed, Commissioner Avern Cohn, when asked what would have occurred if the first 100 officers for promotion had been black, stated that: "the likelihood of dipping down under those circumstances probably would not have been necessary because the objects of the Affirmative Action Program was to increase the number of black police officers to a reasonable percentage. There would have been no need to dip." (2472a; 2473a).

factor. The result is an obvious violation of Title VI, as well as the Fourteenth Amendment.

Even if the City had established past discrimination against blacks, as in *Uzzell* the "remedial measures presently enforced impinge upon the rights of others", 591 F.2d at 1000, specifically 112 white employees who have been denied timely promotion to the rank of sergeant since July 1974.

Plaintiffs' view of Title VI is further reinforced by other limitations on the use of federal funds provided by the LEAA.[39] 42 U.S.C. § 3766(b) and (c) provide:

> "(b) Notwithstanding any other provisions of law nothing contained in this Chapter shall be construed to authorize the Administration (1) to require, or condition the availability or amount of a grant *upon, the adoption by an applicant or a grantee under this Chapter of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency,* or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this Title to adopt such a ratio, system, or other program.
>
> "(c) (1) No person in any State shall on the ground of race, color, national origin or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this Chapter." (Emphasis added). 42 U.S.C. § 3766(b) and (c)(1)[40]

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[39] That agency is authorized to distribute funds under the Omnibus Crime Control and Safe Street Acts, P.L. 90-351, Title I, § 519 (June 19, 1968), 42 U.S.C. § 3766, 82 Stat. 208; *as amended* P.L. 94-503, 90 Stat. 2422 (October 15, 1976).

[40] The prohibitions in 42 U.S.C. § 3766(b) and (c)(1) have been incorporated in federal regulations, adopted on February 16, 1977, regarding the distribution of LEAA funds. See 42 Fed. Reg. 9492, 28 CFR § 42.203.

The LEAA regulations, as well as its enabling statutory provisions, re-enforce the finding in *Bakke* that Title VI was intended to prohibit discrimination against *all* individuals, regardless of race or color. In upholding the quota, the Sixth Circuit clearly ignored the mandates of the LEAA and *Bakke*.

A comparison of the Sixth Circuit's October 12, 1979 decision and the February 2, 1979 decision of the Fourth Circuit in *Uzzell* reveals a clear conflict among the circuits as to the interpretation of *Bakke*. The Sixth Circuit's improper interpretation of *Bakke* and its conflict with the Fourth Circuit mandates review by this Court.

III. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S FINDING THAT THE RACIAL QUOTA VIOLATED THE FOURTEENTH AMENDMENT

A. A Majority Of The Court Has Not Ruled Upon The Constitutionality of Racial Quotas In The Public Sector.

At issue in this case is the constitutionality of a *continuing* racial quota, unilaterally enacted by a governmental body, which operates against a readily identified group of white employees solely because of race.[41]

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[41] Obviously, in the event that the Court decides that Plaintiffs' statutory rights under either 42 U.S.C. § 1981, 2000d or 2000e have been violated, it would not be necessary to address the equal protection issue since: "The Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of." See *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Concurring opinion of Brandies, J.); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979); *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105 (1944); *Massachusetts* v. *Westcott*, 431 U.S. 322, 323 (1976); *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 411 (1978) (Opinion of Stevens, J.).

The Fourteenth Amendment provides, in pertinent part, that: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 2.

The constitutionality of racial quotas adopted in the name of "affirmative action", is an issue that has so far evaded a majority decision of the Court, despite several opportunities. The issue was first presented to this Court in *Defunis* v. *Odegaard,* 416 U.S. 312 (1974), which involved a racial quota employed by the University of Washington's law school. The quota operated to exclude a white applicant solely because of his race. Although a majority of the Court dismissed the matter as moot, 416 U.S. at 319-320, Justice Brennan, in an opinion signed by Justices Douglas, White and Marshall, noted that: "few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this Court." 416 U.S. at 350.

The constitutionality of a racial quota next confronted the Court in *Regents of the University of California* v. *Bakke, supra.* Four justices, in an opinion authored by Justice Brennan, and signed by Justices White, Marshall and Blackmun, found that the racial quota, which denied the plaintiff admission to medical school based upon his race, complied with the Equal Protection Clause. 438 U.S. at 325-26. Justice Powell, on the other hand, reached the constitutional issue but applied a different standard than that enunciated by Justice Brennan, noting that he "disagreed with much that is said in their opinion." 438 U.S. at 296, n.36. The remaining four Justices, in an opinion authored by Justice Stevens, found that since the racial quota violated Title VI of the Civil Rights Act of 1964, there was no need to address the Equal Protection claim. See 438 U.S. at 411-12. *Bakke,* therefore, produced two separate constitutional standards: one standard endorsed by four Justices and one standard endorsed by Justice Powell.

The constitutionality, under the Fifth Amendment, of the

10% minority set aside provision of the Local Public Works Capital Development and Investment Act of 1976, P. L. No. 94-369, 90 Stat. 999-1012, 42 U.S.C. § 6701-6735, is presently before this Court in *Fullilove* v. *Kreps*, 584 F.2d 600 (2d Cir. 1978), *cert. granted*, 99 S.Ct. 2403 (May 21, 1979).

The absence of any definitive ruling upon the constitutionality of race-conscious quotas led the Sixth Circuit to commit significant errors in reviewing Plaintiffs' Fourteenth Amendment claims.

B. The Constitutional Standard Adopted By The Sixth Circuit.

The Sixth Circuit initially noted that it had "no clear authority in dealing with the constitutional issues," (CA 32a), but subsequently concluded "that the opinion of Justices Brennan, White, Marshall and Blackmun in . . . *Bakke*, *supra*, 438 U.S. at 324, offers the most reasonable guidance." (CA 32a). Based upon the plurality opinion, the Sixth Circuit "conclude[d] that the District Court committed a number of errors of law." (CA 32a).

According to the Sixth Circuit, it was "error to require proof that the persons receiving the preferential treatment had been individually subjected to discrimination, for 'it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination.'" (CA 32a). The Sixth Circuit further found that "the District Court should have determined first whether appropriate findings were made by a public body 'with competence to act in this area'" and "it was . . . error to require that there be a judicial determination of past discrimination for a state to undertake a race-conscious remedy. . . ." (CA 33a). Finally, the Sixth Circuit noted that: "As the Four Justices wrote in *Bakke* . . . a more precise meaning of 'strict scrutiny' is required when considering state action taken for the purpose of remedying past discrimination. 438 U.S. at 357." (CA 33a).

These interpretations by the Sixth Circuit led that Court to enunciate the following "constitutional standard" in judging so-called "benign" racial quotas:

> "When claims are brought by members of a group formerly subjected to discrimination *the case moves with the grain of the constitution and national policy.* A suit which seeks to prevent public action designed to alleviate the effects of past discrimination *moves against the grain,* and the official actions complained of must be subjected to the analysis prescribed in *Weber* and the plurality opinion in *Bakke* which we find controlling." (CA 39a).

The Sixth Circuit has effectively abandoned the standard of "strict scrutiny" for the constitutional review of racial classifications. In reaching this conclusion, the Sixth Circuit adopted an unprecedented constitutional standard, never embraced by a majority of this Court. Moreover, whether the "strict scrutiny" standard of Justice Powell or the "strict and searching" standard of Justice Brennan is applied, the City failed to provide either a "compelling state interest" or to show that the racial quota "serve[s] important governmental objectives" and is "substantially related to achievement of both objectives."

The strict scrutiny that this Court has applied to racial classifications, regardless of motivation, was recently reaffirmed in *Personnel Adm'n of Massachusetts* v. *Feeney,* 99 S.Ct. 2282, 2292 (1979):

> "Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. *Brown* v. *Board of Education,* 347 U.S. 483; *McLaughlin* v. *Florida,* 379 U.S. 184."

The claim of government officials of a benign, compensatory purpose does not excuse a racial classification from the most exacting judicial examination. *Regents of the University*

of California v. *Bakke, supra,* 438 U.S. at 290-91; (Op. of Powell, J.); 438 U.S. at 355-62; (Op. of Brennan, Blackmun, White, Marshall, J.); *Id.,* 438 U.S. at 405, (Op. of Blackmun, J.); *see also, Califano* v. *Webster,* 430 U.S. 313, 317 (1977).

In *Bakke,* Justice Powell found that a classification based upon race, whether invidious or benign, still was rendered suspect:

> "Because of that foreclosure, some individuals are excluded from enjoyment of state-provided benefit – admission to the medical school – they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect." 438 U.S. at 305.

Justice Brennan noted that "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of these objectives.'" 438 U.S. at 359. Justice Brennan also set forth the following "middle tier of scrutiny" standard that was accepted by the Sixth Circuit:

> "Instead, to justify such a classification important and articulated purposes for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus our review under the Fourteenth Amendment should be strict – not 'strict in theory and fatal in fact,' because it is stigma that causes fatality – *but strict and searching nonetheless.*" 438 U.S. at 361-62.[42] (Emphasis added).

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[42] The middle tier of scrutiny for purportedly benign racial classifications has not been endorsed by a majority of the Court. It has not even been endorsed for the constitutional review of gender-based classifications, where it first appeared. The middle tier of scrutiny was articulated by Justice Brennan in his Opinion for the Court in *Craig* v. *Boren,* 429 U.S. 190 (1976), but at least five Justices wrote concurring

The traditional "strict scrutiny standard" is clearly applicable in this case, but even under the standards of Justice Brennan, the City's racial quota fails to comply with the Fourteenth Amendment. The City has simply failed to establish "an important and articulated purpose" for the use of its racial quota.

Further, the white Plaintiffs stand among "those least well represented in the political process to bear the brunt of a benign program." 438 U.S. at 361. In Detroit, the policies of the Police Department are dictated, in large part, by the incumbent black Mayor, Coleman A. Young, and the incumbent black Police Chief, William Hart. Appointments to the Board of Police Commissioners, have been made at the sole discretion of Mayor Young. The Plaintiffs' union was totally excluded from participating in the decision to implement the quota. The individual Plaintiffs, locked out of the decision-making process, were required "to bear the brunt of [the] benign program."[43] Unlike *Bakke*, this case does not involve the majority imposing a benign program to the detriment of the majority.

The opinions of Justices Powell and Brennan in *Bakke*

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and dissenting opinions either questioning or opposing a "middle tier" of scruntiny for the Equal Protection Clause, *Craig* v. *Boren, supra,* at 210 (Op. of Powell, J.); *Id.*, at 211-212 (Op. of Stevens, J.); *Id.*, at 220 (Op. of Rehnquist, J.); *Id.*, at 215, 217 (Op. of Burger, J.); and *Id.*, at 215 (Op. of Stewart, J.). Justice Blackmun did not join the plurality opinion with regard to the conclusion that the statute was a gender-based denial of equal protection. *Craig, supra,* at 214. Justice Blackmun also joined in the dissent of Justice Rehnquist in *Califano* v. *Goldfarb,* 430 U.S. 189 (1977), which held, *inter alia,* that the gender-based classification was rationally justifiable. The Court's recent decision in *Personnel Adm'r of Massachusetts* v. *Feeney,* 99 S.Ct. 2282 (1979), appears to reject the "middle tier" theory of constitutional scrutiny since it approved the "national basis standard" to a claim of gender based discrimination.

[43] Justice Blackmun, in his concurring opinion in *Bakke*, noted that: "I, of course, accept the proposition that . . . racial and ethnic distinctions where they are stereotypes are inherently suspect and call for exacting judicial scrutiny." 438 U.S. at 404-05.

offer two separate standards for reviewing alleged "benign" racial quotas. The Sixth Circuit, in the instant case, opted in favor of Justice Brennan's less exacting standard of judicial review.

On the other hand, the Fourth Circuit, *en banc*, in *Uzzell* v. *Friday*, 591 F.2d 997 (4th Cir. 1979), recently adopted the "strict scrutiny standard" of Justice Powell.

Given the absence of adequate standards governing constitutional review of racial quotas, and, given the conflict among the circuits, it is imperative that this Court finally decide the constitutionality of racial quotas which deprive a readily identifiable class of white workers employment opportunities because of race.

C. Classifications Based Upon Race Are Constitutionally Suspect And Must Be Subject To The Most Rigid Judicial Scrutiny.

The decisions of this Court concerning racial classifications from *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948), and *Sweatt* v. *Painter*, 339 U.S. 629 (1950), *reh. den.*, 340 U.S. 846 (1950), through *Bakke*, *supra*, have one common predicate: a purposeful racial classification is inherently suspect and violative of the Fourteenth Amendment unless necessary to promote a substantial or compelling state interest.

A majority has never deviated from the rule set forth in *McLaughlin* v. *Florida*, 379 U.S. 184 (1964):

> "But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate the racial discrimination eminating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect'. *Bowling* v. *Sharpe*, 347 U.S. 497, 499, 98 L.Ed. 884, 886, 74 S.Ct. 693, and subject to the 'most rigid scrutiny.' *Korematsu* v. *United States*, 323 U.S. 214,

> 216, 89 L.Ed. 194, 198, 65 S.Ct. 193." 379 U.S. at 191-192.[44]

In *Uzzell* v. *Friday, supra,* the Fourth Circuit agreed that racial classifications, which operate to the detriment of white students, "'must be regarded as suspect.'" 591 F.2d at 998. The Fourth Circuit, in adopting the standards set forth by Justice Powell in *Bakke,* indicated that:

> "'In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . . to the accomplishment" of its purpose or the safeguarding of its interest.'" 591 F.2d at 999.

Uzzell demonstrates a clear and complete conflict between the Fourth Circuit and the Sixth Circuit on the constitutional standards to be employed in determining whether or not a racial quota violates the Equal Protection Clause.

The Sixth Circuit, without precedent, has deviated from well-established law that racial classifications must bear the strictest scrutiny. This Court must review and reverse that error.

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[44] It has been more than three decades since any decision of this Court has upheld under the constitution a racial classification which resulted in a detriment solely on the basis of race: *Korematsu* v. *United States,* 323 U.S. 214 (1944), and *Hirabayashi* v. *United States,* 320 U.S. 81 (1943), both of which were war-time cases involving curfew and relocations imposed upon Japanese-Americans. These cases have suffered severe criticism subsequent to their decision. E.G., Rostow, The Japanese-American Cases — A Disaster, 54 *Yale L.J.* 489 (1945).

D. The City Has Not Justified Its Racial Classification By Showing A Compelling State Interest.

To justify an inherently suspect racial classification, the State must establish that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment of its purpose or the safeguarding of its interest." *In re Griffiths*, 413 U.S. 717, 722-723 (1973); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964); *Bakke, supra*, 438 U.S. at 305. (Op. of Powell, J.). Additionally, the State must show that no less restrictive alternative is available to accomplish the alleged compelling State interest. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

The City has attempted to satisfy these rigid constitutional standards on primarily two grounds: (1) the need for a general remedy for past discrimination against blacks in the Detroit Police Department; (2) the goal of achieving a racial balance of supervisory personnel roughly reflective of the general population of Detroit, in order to satisfy certain "operational needs".

The District Court found that these grounds did not justify the type of "remedy" used and were not supported by the record. The Sixth Circuit in accepting both arguments, misapplied the law by (1) failing to identify any prior discrimination in *promotion*; (2) usurping the District Court's role of determining the appropriate labor market; and (3) considering in a *promotional case*, isolated instances of alleged racial discrimination in job assignments and the purported adverse impact of an entry level examination.

(1) There Was No Evidence Or Finding Of Prior Promotional Discrimination.

The Sixth Circuit found that the "District Court erred in treating evidence of disparate impact of hiring and promotion practices as having no probative value." (CA 30a). The only reference in the Sixth Circuit Opinion, to any disparate impact, relates to the promotional examinations given in 1973, 1974 and 1976 (a legal irrelevancy).

The record is devoid of any evidence relative to promotions to the rank of sergeant prior to 1973. The City failed to offer any evidence to show: (1) the number of blacks promoted to sergeant during that period; (2) that any black officer was ever denied a promotion; (3) the number of black sergeants through the years 1940 to 1963; (4) the number of blacks applying for promotion for the years 1940 to 1973; (5) the racial composition of promotions made from 1940 to 1973; (6) the number of qualified blacks who applied for promotion prior to 1973; (7) the effect upon any racial group of promotional models used for the period from 1940 to 1973. The failure of the City to offer the exam results or any other statistics relative to promotions prior to 1973, precluded a finding of discrimination in promotions *prior to that date*. Further, there is no legal support for a finding of promotional discrimination from 1973 to the present.

Regarding promotions after 1973, the Sixth Circuit noted that: "Considering the other elements of the 'promotional model' the District Court found that none was shown to have any disparate impact. . . ." (CA 6a). The Sixth Circuit further noted that "the Court found that all of these written examinations for promotion to sergeant were *job-related and content valid*" (CA 8a) and that "past promotional practices were also found not to be discriminatory either in the composition of the promotional models or their application." (CA 8a). (Emphasis added). The Sixth Circuit specifically affirmed these findings by stating that "job related non-dis-

criminatory exams for sergeant were instituted in 1973. . . ." (CA 38a).

The only reference to evidence of discrimination in the area of promotions by the Sixth Circuit was in the form of statistics purporting to show an adverse impact:

> "The witness [Commander Caretti] stated that despite all efforts to eliminate bias the written promotional exams retained an adverse impact on black candidates. The examination for promotion to sergeant which was given in December, 1973, produced a 72% failure rate among black candidates and a 57% failure rate among white candidates. For the November, 1974, examination the black failure rate was 61%; that of the white candidates was 47%. The May, 1976, failure rate was 58% for black and 47% for white candidates." (CA 5a).[45]

In light of the unreversed District Court finding that the promotional process was job related, content valid and nondiscriminatory and the unreversed finding that "there was no suitable alternative to the written examination which would have less adverse racial impact," (DC 991a), any disparate impact would be legally irrelevant. A finding of disparate impact on the 1973 or 1974 examination would not justify a finding of promotional discrimination. It would merely trigger the standard of proof set forth by this Court in *Albemarle Paper Corp.* v. *Moody*, 422 U.S. 405 (1975), for cases where a plaintiff proves a *prima facie* case through the use of statistics.

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[45] The Uniform Guidelines on Employee Selection Procedures, 29 CFR § 60-3.4(b) provide that a disparate impact will generally not exist if the rate of the minority candidates is at least 80% of the rate of the majority candidate. In the instant case, it is clear that, for the May, 1976, examination, black candidates for promotion had in excess of 80% of the rate of passage for white candidates. Therefore, the Sixth Circuit exhibited an obvious misunderstanding of the applicable law in finding any disparate impact on the May, 1976, examination.

"If an employer does then meet the burden of proving that its tests are "job-related," it remains open to the complaining party to show that other tests or selection devices without a similarly undesirable racial effect, would also serve the employer's legitimate interests in 'efficient and trustworthy workmanship.' *Id.*, at 801." (Emphasis added). 422 U.S. at 425.

(2) The Scope Of The Remedy Allowed By The Sixth Circuit Improperly Exceeds The Extent Of Any Unlawful Violations.

Since the alleged specific discrimination identified by the Sixth Circuit occurred at the entry level and in job assignments, there is no justification for the Sixth Circuit's sanction of a remedy related to promotions. Such an approach violates the settled rule that the nature of the violation determines the scope of the remedy. *See Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977); *Milliken* v. *Bradley,* 418 U.S. 717 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971).

As Justice Powell noted in *Bakke,* this Court has "never approved preferential classifications in the absence of proven constitutional or statutory violations" and "the scope of the remedies was not permitted to exceed the extent of the violations." 438 U.S. at 300-302. (Op. of Powell, J.). Conceding, *arguendo,* discrimination at the entry level or in job assignments, there can be no lawful racial quota for promotions absent proof of promotional discrimination.

The Sixth Circuit also found that "it was error to require proof that the persons receiving the preferential treatment had been invidiously subjected to discrimination." (Slip op. at p. 32). In *Bakke,* Justice Powell noted that the Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the

expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." 438 U.S. at 307. (Op. of Powell, J.).

The state's failure in *Bakke* to recognize the personal and individual nature of the right guaranteed by the Fourteenth Amendment was fatal to its affirmative action program:

> "The fatal flaw in petitioners' preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelly* v. *Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 2d 1161 (1948)." 438 U.S. at 320. (Op. of Powell, J.).

See also Uzzell v. *Friday, supra,* 591 F.2d at 1000.

One fatal flaw in the City's plan is its total disregard for the individual rights of the Plaintiffs in favor of the rights of an amorphous class never shown to be the victims of discrimination in promotion, hiring or job assignment. The deprivation of individual rights is even more severe in light of the District Court's unreversed finding that "the higher a candidate stood on the eligibility register the better qualified and equipped he was to assume the position of Sergeant." (CA 7a). While "the Davis program [did] not simply advance less qualified applicants . . .", 438 U.S. at 375, (Op. of Brennan, White, Blackmun, Marshall, J.J.), the City's racial quota did result in the promotion of less qualified applicants to the rank of sergeant.

No past constitutional violation with regard to the promotion of blacks has been proven. Evidence of past discrimination in hiring or job assignment, therefore cannot excuse a promotional quota.

(3) The Court Of Appeals Improperly Disregarded The District Court's Finding As To The Relevant Labor Market.

At trial, the City attempted to make a *prima facie* case of unconstitutional discrimination against blacks through a statistical comparison of the entry level work force to the *general population* of the City of Detroit. The Plaintiffs, deprived of any applicant data,[46] presented unrefuted evidence that up until August 1, 1974, the City recruited and hired applicants throughout the Detroit Standard Metropolitan Statistical Area (SMSA). The City never offered any labor force data relative to the City of Detroit. Further, the City introduced no evidence to establish what, in their opinion, constituted the relevant labor market.

The Sixth Court first noted that "Statistical evidence of racially disparate impact of employment practices alone may establish a statutory violation" and "may also demonstrate a constitutional violation." (CA 17a).[47] The Sixth Circuit

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[46] On May 19, 1977, prior to trial, the District Court entered an order compelling the City to provide Plaintiffs with all information and statistics relative to the number of applications received from residents within and without the City of Detroit during the past ten years. On August 15, 1977, after the commencement of trial, counsel for the City denied that information because "the relevancy is so tenuous". (1001a.-7-1001a.8). Given the City's refusal to provide the Plaintiffs with applicant flow data, it would seem that the City has "little to complain about insofar as the make up of the applicant pool is concerned since they refused on grounds of irrelevancy to allow discovery . . . ." *New York City Transit Authority* v. *Beazer*, 99 S.Ct. 1355, 1373 (1979) (Op. of White and Marshall, J.J.).

[47] In *Teamsters, supra*, 431 U.S. at 340, n.20, the Court noted that, in the context of a *Plaintiff's* case, statistical evidence was allowed to make a *prima facie* case of discrimination since: "In many cases the only available avenue of proof is the use of racial statistics to uncover a covert discrimination by the employer union involved." This rationale should not justify the City's reliance on statistics to prove past discrimination since the City, and not the Plaintiffs, was in full control of any relevant evidence of past discrimination against minorities. In *Teamsters*, the Court further accepted the settled principle that "pre-

noted that "[t]he selection of the SMSA labor market as the sole benchmark was not warranted . . . in view of the adoption of a City-residency requirement during the 'period in question'" (CA 20a). But the City's own Exhibits established that for the period from (at the latest) 1954 to August 1, 1974, the only pre-employment residence requirement was that the applicant be a resident of the State of Michigan for one year preceding application. (1239a). Only after August 1, 1974, did an applicant have to be a resident of Detroit for sixty days prior to the date of application. (1239b). Since the Sixth Circuit found that discrimination at the entry level ended in 1973, and since the racial quota was adopted in July of 1974, during the relevant *"period in question"* there was no pre-employment residence requirement for the City of Detroit. This is one more significant factual error by the Sixth Circuit.

The Sixth Circuit also committed a significant legal error on the same issue. In reversing the finding of the District Court that the Detroit SMSA was the "relevant labor market", the Sixth Circuit relied upon prior decisions that had approved "the use of City population . . . in cases involving public agencies which provide services city-wide." (CA 20a). The decisions cited by the Sixth Circuit,[48] however, were decided prior to the Court's decision in *International Brother-*

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sumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with the party's superior access to the proof" and represents a judicial acknowledgment that "the employer was in the best position to show why any individual employee was denied an employment opportunity." 431 U.S. at 359, n.45. In this case, the City clearly had better access to the type of proof that could prove or disprove its claim of past discrimination.

[48] *Afro-American Patrolmen's League* v. *Duck*, 503 F.2d 294 (6th Cir. 1974); *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1021 n.6 (1st Cir. 1974), *cert. den.*, 421 U.S. 910 (1975); *Vulcan Society of N.Y.C. Fire Dept.* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973); *Erie Human Relations Commission* v. *Tullio*, 493 F.2d 371 (3rd Cir. 1974).

hood of Teamsters v. *United States,* 431 U.S. 324 (1977), and *Hazelwood School District* v. *United States,* 433 U.S. 299 (1977). In *Teamsters,* this Court "caution[ed] only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be refuted." 431 U.S. at 340. The Court further indicated that "evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant." 431 U.S. at 340, n.20.

Thereafter, in *Hazelwood School District* v. *United States, supra,* the court noted, in dealing with school teachers, that the "proper comparison was between the racial composition of Hazelwood's teaching staff *and the racial composition of the qualified public school teacher population in the relevant labor market.*" (Emphasis added). 433 U.S. at 308. The Court further indicated that the use of general population statistics was an improper comparison when detailed qualifications were required by the employer:

> "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." 433 U.S. at 308, n.13.

See also Kirkland v. *New York State Department of Correctional Services,* 520 F.2d 420, 428 (2nd Cir. 1975).

Since this Court's opinions in *Teamsters* and *Hazelwood,* the Courts of Appeals have consistently held that the proper statistical comparison must be with the relevant labor market and not the general population, which includes people disqualified from employment because of age, disability, etc. See *Alexander* v. *Aero Lodge No. 735,* 565 F.2d 1364 (6th Cir. 1977); *EEOC* v. *Local 14, International Union of Operating Engineers,* 553 F.2d 251 (2d Cir. 1977); *Thompson* v. *Mc-*

Donnell Douglas Corp., 416 F.Supp. 972 (E.D. Mo. 1976), *aff'd*, 552 F.2d 220 (8th Cir. 1977); *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830 (D.C. Cir. 1977).

As in *Hazelwood*, and unlike *Teamsters*, the Detroit Police Department required applicants for the position of police officer to fulfill certain threshold requirements, including restrictions on age and education.[49]

Doctor Marc Rosenblum[50] and Mr. Charles Guenther, the only experts called on this issue, unequivocally testified that the Detroit SMSA was the relevant labor market. (2597a, 1690a). Both experts testified that a comparison with the general population was improper because general population figures include data on the number of people who are institutionalized, disabled, not available for work, under the age of 16, school children, etc. (1690a-1696a; 2624a).

Thus, based upon the evidence, the only proper conclusion was that the Detroit SMSA was the relevant labor market at least until August, 1974. (1239b).

Using the City of Detroit's population as a base for statistical comparison, the Sixth Circuit found statistical evidence of discrimination at the entry level. (CA 20-21a). The proper

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[49] Since 1954, the Department has required that an applicant have a B.A., high school diploma or a G.E.D. (1239b). Age requirements varied from 21-27 years during 1954-64, to 18-32 years currently. (1239b).

From 1954 to 1973, an applicant had to have a valid drivers license which was not revoked, suspended or restricted. From 1973 to the present, a traffic record had been considered on an individual basis. (1239b). Since 1968 black and white applicants have been rejected at equal rates under these threshold criteria. (2186a-2193a).

[50] Doctor Rosenblum was the staff economist with the National Commission on Employment and Unemployment Statistics since August of 1977. He received a Master's Degree in Economics at New York University and received a Ph.D. in Industrial Relations from the University of Minnesota in 1972. (2591a-2594a; 1366b-1370b).

statistical comparisons, made with the appropriate relevant labor market, however, give rise to the following results:

Percentage of Blacks Year Hired[51]	Percentage of Blacks in Relevant Market[52]
1968 – 35%	1968 – 15.4% (SMSA)
1969 – 23%	1969 – 15.6% (SMSA)
1970 – 20%	1970 – 15.9% (SMSA)
1971 – 26%	1971 – 16.2% (SMSA)
1972 – 30%	1972 – 16.4% (SMSA)
1973 – 30%	1973 – 16.6% (SMSA)
1974 – 48%	1974 – 37.0% (Detroit)
1975 – 64%	1975 – 37.9% (Detroit)
1976 – none hired	1976 – 38.9% (Detroit)
1977 – 80%	

The Sixth Circuit, through erroneous factual and legal conclusions, improperly usurped the function of the District Court in ascertaining the relevant labor market. The correct statistics demonstrate that black applicants were hired far in excess of their representation in the relevant labor market from 1968 through 1978. The Sixth Circuit's finding of *any* statistical imbalance in the hiring ratios of black applicants is erroneous.[53]

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[51] See Exhibit 269 (1236b).

[52] See Exhibit 242, Table 2a (1349b) and Exhibit 242, Table 1a (1348b).

[53] The Sixth Circuit also rejected the District Court's use of 1970 SMSA census data since "it was distinctly possible that by 1974 the metropolitan labor force had become increasingly black (CA at 21). But Exhibit 242, Table 2a (1349b) reveals that by 1973 the SMSA was only 16.6% black. There was no "gross disparity" between the 16.6% black population of the 1973 SMSA data and the 17.23% black population in the Department in 1974.

(4) The Court of Appeals Has Identified No Unconstitutional Discrimination Against Blacks In The Hiring Practices Of The Department.

The Sixth Circuit, in finding unconstitutional discrimination against blacks, relied exclusively upon the "adverse impact" of the entry level hiring examination prior to 1973 and alleged discrimination in job assignments. (CA 24-25a, 30-31a).

As shown in the Statement of Facts, the record establishes that there was no *institutionalized* decision to discriminate on the basis of race in job assignments. (Infra, pp. 12-14). Plaintiffs do not deny that the City apparently had segregated scout cars in the 1940's and '50's. These practices were eliminated by the mid-1960's, as were the other forms of job assignment discrimination identified by the City. These earlier forms of discrimination were never shown to affect upward mobility of black officers, particularly those who received preferential promotions in 1974 and thereafter.

Any under-representation at the entry level clearly arose from racially neutral hiring criteria and testing. The unrefuted testimony was that the Department has always applied the same qualifications to blacks and whites seeking entry level positions, both before and after 1968 (1239b; 772a; 2119a).

This Court has held that where a classification is racially neutral on its face, but has a disproportionate racial impact, proof of a racially discriminatory *intent* or *purpose* is necessary to show a violation of the Equal Protection Clause. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *See also Personnel Adm'n of Massachusetts* v. *Feeney*, 99 S.Ct. 2282, 2292 (1979).

In *Washington* v. *Davis, supra*, black plaintiffs attacked the entry level examination of the District of Columbia Metropolitan Police Department as racially discriminatory. They relied upon statistical proof that blacks failed the examination

at a rate four times greater than that of white applicants. The Court acknowledged statistical disparaties, but ruled that plaintiffs failed to establish a constitutional violation:

> "Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the powers of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another . . . ." 426 U.S. at 242.[54]

In *Village of Arlington Heights, supra,* the Court restated that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." 429 U.S. at 264-265.[55] Here, as in *Arlington Heights, Washington* and *Feeney,* there is a record of prior actions by the Detroit Police Department which are neutral, rather than discriminatory, on their face.

The City failed to offer any evidence, statistical or otherwise, relative to hiring or promotional practices prior to 1968. Undeniably, no objective evidence of intentional discrimination was introduced. Mere proof that blacks failed the examination at a substantially greater rate than whites would

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[54] Contrary to the decision of the Sixth Circuit in the instant case, both the Fifth and Seventh Circuit Court of Appeals, in interpreting *Washington* v. *Davis, supra,* have consistently held that facially neutral hiring practices, which have a racially discriminatory impact, do not violate the Equal Protection Clause of the Fourteenth Amendment. See *United States* v. *City of Chicago,* 549 F.2d 415, 435 (7th Cir. 1977), *cert. den. sub nom., Arado* v. *United States,* 434 U.S. 875 (1977); *Grigsby* v. *North Mississippi Medical Center,* 586 F.2d 457 (5th Cir. 1978).

[55] See *Snowden* v. *Hughes,* 321 U.S. 1, 8 (1944); *Keyes* v. *School District No. 1,* 413 U.S. 189, 208 (1973); *Austin Independent School District* v. *United States,* 429 U.S. 990 (1976); *Personnel Administrator of Massachusetts* v. *Feeney,* 99 S.Ct. 2282, 2292 (1979); *School District of Omaha* v. *United States,* 433 U.S. 667 (1977).

not, of itself, establish a violation of the Equal Protection Clause.[56]

The Sixth Circuit failed to recognize the simple fact that the City has been unable to document and *prove* the intentional constitutional violation which they confess.

In finding evidence of a constitutional violation, the Sixth Circuit referred to the "gross under-representation of blacks on the Detroit Police Force" (CA 30a). Also, the District Court was faulted for not considering "its own findings that the pre-1973 entry level written examination had serious flaws which tended to work against black applicants." (CA 30a). Then, as a legal basis for its decision, the Sixth Circuit relied on this Court's recent decision in *Columbus Board of Education* v. *Penick*, 99 S.Ct. 2941 (1979), and found that the "standard of proof of constitutional violations" was that "'actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose.'" (Slip Op. at p. 30).

In *Penick*, however, the District Court had found "'That the Columbus Board of Education never actively set out to dismantel the dual school system'" and that "[t]he Columbus Board even in very recent times . . . has approved the optional attendance zones, discontiguous attendance areas and boundary changes which have maintained and enhanced racial imbalance in the Columbus Public Schools,'" 99 S.Ct. at 2944; and had "[k]nowingly continued its failure to eliminate the consequences of its past intentionally segregative policies." 99 S.Ct. at 2948. Contrary to the finding of the Sixth Circuit, the Court specifically noted that "Disparate impact and foreseeable consequences, *without more*, do not establish a

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[56] The Sixth Circuit also refused to accept the consequences of a finding of the Board of Police Commissioners (BPC) of only *de Facto* discrimination. *De Jure* discrimination violates the Constitution, but *de Facto* discrimination does not. *Keyes* v. *School District No. 1*, 413 U.S. 189, 208 (1973); Cf. *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 28 (1971).

constitutional violation." 99 S.Ct. at 2950. (Emphasis added).

Unlike *Penick*, the record of this case is replete with evidence of the herculean (and effective) efforts of the City since 1968 to increase the number of black officers in the Department.

In ignoring the impact of these efforts, the Sixth Circuit also ignored the mandate of the Court in *Washington* v. *Davis*, 426 U.S. 229 (1976):

> "Even agreeing with the District Court that the differential racial impact of Test 21 called for further inquiry, we think the District Court correctly held that *the affirmative efforts of the Metropolitan Police Department to recruit black officers*, the changing racial composition of the recruit class and of the force in general, and the relationship of the Test to the training program *negated any inference that the Department discriminated* on the basis of race or that 'a police officer qualifies on the color of his skin rather than ability.'" 426 U.S. at 246. (Emphasis added).[57]

Under standards set forth in *Washington* v. *Davis* and *Penick*, there clearly have been no recent violations of the constitutional rights of black applicants. Further, the statistical comparisons (*Infra*, p. 76) show that any under-representation caused by the entry level process was eliminated in 1974, when the City adopted its promotional quota.

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[57] The Sixth Circuit noted that "in 1968 the total black component of the Detroit Police Force was between four and five percent" (Slip Op. at p. 2), and "[i]n 1974, the Department was 17.23% black." (Slip Op. at p. 20). In the space of six years, the affirmative recruitment efforts of the City had *tripled* the black representation in the Department.

(5) The Goal Of A Department-Wide Racial Balance Does Not Provide A Compelling State Interest For A Racial Quota.

The City has claimed "that improved law enforcement is a sufficiently important reason in itself" to legitimate its racial quota for promotions. To accept this rationale, the Sixth Circuit adopted a new and unprecedented constitutional standard:

> "The arguments that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public's support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions. It is therefore apparent that the District Court misconstrued this justification for affirmative action, and that the justification offered by defendants is a substantial one." (CA 36a).

Despite the Sixth Circuit's attempt to refine the City's argument, the City must be bound by the testimony of its officials at trial.

The undisputed intent of the City, since Mayor Young's election in the fall of 1973, was to obtain a department that, at all levels, reflected the racial composition of the population of Detroit. Chief Phillip Tannian, the architect of the racial quota, unequivocally testified that his Department's objective was: "that the racial makeup of the Department should reflect the City of Detroit. . . ." (1316a). Tannian further admitted that Mayor Young campaigned on a promise that the Detroit Police Department would accurately reflect the racial balance of the City as a whole. (1439a-1440a).[58]

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[58] The racial balance objective was confirmed by members of the

The single mindedness of the City's effort to achieve a racial balance on the Department was set forth by Chief Hart as follows:

> "Q: (Mr. Brady) Now this compelling need that you were referring to, Chief Hart, as I recall your testimony on direct examination from Mr. Andary, it was the belief on your part that since the community of Detroit was 50% white and roughly 50% black you needed a police force that approximated that, correct?
>
> A: Yes.
>
> • • •
>
> Q: I do not know, but I am asking (if the City of) Dearborn is approximately 100% white?
>
> A: And I suppose their police department probably reflects that fact, doesn't it?
>
> • • •
>
> Q: According to your policies then, the Chief of Police there in Dearborn, based on operational needs, could exclude black officers, correct?
>
> A: *That is a fact, yes.*
>
> • • •
>
> Q: (The Court) Don't you think that a black police officer, well qualified black police officer, would do just as good a job in Dearborn, Grosse Pointe, or Bloomfield?
>
> A: Yes, but as public servants, *we have to reflect what the people would like. That is one of the problems in Detroit. It has nothing to do with the officer's professionalism.* (Emphasis added)." (2325a-2327a).

Board of Police Commissioners who approved the racial quota. Commissioner Peek stated that a reason for the quota was: "Basically that the Department did not reflect in its black and white ratio the makeup of the City of Detroit." (2452a). *See also,* Testimony of Thomas Ferebee, Director of Recruiting (2165a); and Commissioners Cohn (2468a) and Littlejohn (2428a).

The Sixth Circuit, in elevating the political goal of a 50-50 racial balance to the level of "substantial government interest, ignored this Court's settled precedent. There is neither a constitutional necessity for nor a right to a racial balance. This Court has so held in the areas of school segregation,[59] jury selection,[60] and school admissions.[61]

The City's racial preference promotional plan is a flat quota to achieve 50% black supervisory representation. White officers are isolated and excluded from one-half of the promotions available solely because they are white. The process not only stigmatizes and isolates identifiable white officers. Black candidates are also stigmatized and demeaned.[62] Unlike *Swann, supra,* where the Court corrected, "by a balancing of the individual and collective interest, the condition that offends the Constitution" and acted "on the basis of the Constitutional violation", 402 U.S. at 16, the City has not acted in response to judicially determined constitutional violations.

The Equal Protection Clause commands the elimination of racial barriers, not the creation of barriers to satisfy someone's theory as to how society ought to be organized. *Defunis* v. *Odegaard, supra,* at 342 (1974) (Op. of Douglas, J. dissenting). As noted by Justice Powell in *Bakke, supra*:

> "If petitioners' purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but

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[59] *Milliken* v. *Bradley, supra,* at 740-741 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* at 1624 (1971).

[60] *Cassell* v. *Texas,* 339 U.S. 282 (1950).

[61] *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978); *See also DeFunis* v. *Odegaard,* 416 U.S. 312 (1974), dissenting opinion of Douglas, J.

[62] Placement of the "weight of government behind racial . . . separatism" can hardly serve a benign or compelling government purpose. See *Yick Wo* v. *Hopkins,* 118 U.S. 356, 374 (1886).

> as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the constitution forbids." 98 S.Ct. at 2757.

Likewise, the so-called compelling interest of better police-community relations is constitutionally irrelevant. Whether or not black officers have a better rapport with black citizens does not rise to the level of a compelling state interest, particularly in the absence of proof. No proof was offered to support the claim that white officers, as a class, were unable to relate to the minority population[63] or that blacks, by virtue of being black, could more effectively communicate with the black community.

Courts have specifically rejected community preference or administrative convenience as an excuse for racial classification in law enforcement.

In *Baker* v. *City of St. Petersburg*, 400 F.2d 294 (5th Cir., 1968), the Court reversed an opinion allowing the City of St. Petersburg, Florida, to continue the exclusive assignment of black police officers to black neighborhoods. The Court rejected the "operational needs" type defense of the City, stating:

> "Arbitrary racial classifications cannot be condoned just because of the often delicate and sensitive nature of police work.
>
> . . . .
>
> "Of course, if police efficiency were an end in itself, the police would be free to put an accused on the rack. Police efficiency must yield to constitutional rights." 400 F.2d at 299-300.

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[63] Chief Hart confirmed that, in some cases, black officers could relate better to whites than could a white officer, and, conversely, that some white officers could relate better to blacks. (2321a-2322a). Hart had no reluctance to admit that there was no investigation whatsoever of the passed over candidates to determine their ability to communicate with the black community. (2323a).

See also, Washington v. *Lee,* 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam, Lee* v. *Washington,* 390 U.S. 333 (1968).

This Court has consistently ruled that public opinion cannot override the vitality of constitutional principles. *Brown* v. *Board of Education,* 349 U.S. 294, 300 (1954); *Monroe* v. *Board of Commissioners,* 391 U.S. 450, 459 (1968); *United States* v. *Scotland Neck City Board of Education,* 407 U.S. 484, 491 (1972). As stated by this Court in *Cooper* v. *Aaron,* 358 U.S. 1 (1958):

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." 358 U.S. at 16.

The Sixth Circuit's acceptance of the City's "operational needs" argument conflicts with this long standing precedent. If a police department in Detroit can consider as overriding the public's desire for a 50-50 racial balance, a school district should be able to pander to the desires of its citizenry in areas of racial segregation. Moreover, if popular demand for more officers of a certain race is a "compelling state interest", then, as Chief Hart recognized, a white community should be able to lawfully refuse to hire officers of black, Spanish, or Chinese origin as not being "what the public would like" (Hart, 2327a).

The right of individual white police officers to equal protection cannot be sacrified to popular demand. An analogous contention was rejected by the Eighth Circuit in *Smith* v. *Board of Education for Morrilton School District, No. 32,* 365 F.2d 770 (8th Cir. 1966), when an all-white school board argued that black teachers would not have adequate rapport with white students:

"However, in this day race *per se* is an impermissible cri-

terion for judging either an applicant's qualifications or the district's needs. And this applies equally to considerations described as our environment or ability to communicate or speech patterns or capacity to establish rapport with pupils when these descriptions amount only to euphemistic references to actual or assumed racial distinctions." 365 F.2d at 782.

As in *Baker, Smith, Brown, Monroe* and *Cooper* v. *Aaron*, the City's claimed "operational need" for a racial balance to satisfy community preference, cannot, as a matter of constitutional dogma, constitute a "compelling state interest."

(6) The City Failed To Establish That No Other Alternatives Available Would Have Achieved The State's Goal With Less Racial Impact.

As the Court stated in *Kramer* v. *Union School District*, 395 U.S. 621 (1969), in reviewing classifications designed to promote a state objective:

> "[T]he classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal." 395 U.S. at 632[64]

In this case there is no record evidence indicating that the flat numerical quota for black promotions was necessary to serve the needs of the black community. Certainly, there are more precise and reliable ways to identify police officers who can effectively serve Detroit's black neighborhoods than by racial classification. The City, in implementing its racial quota, made no effort whatsoever to identify black officers promoted under the quota as former victims of prior discrim-

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[64] Even in *Swann, supra*, where an overt violation was found, the Court warned that the burden placed on students by requiring them to travel great distances for extended times, as part of a remedy, may be objectionable. 402 U.S. at 29, 30-31. Here, there was a *complete* default by the City to assess and redress the adverse impact of the quota upon its white victims.

ination. The quota, therefore, cannot even be sustained as an attempt to "make whole" former victims of discrimination.

The City's failure to establish that no less restrictive an alternative was available to remedy past discrimination was improperly disregarded by the Sixth Circuit, at the expense of Plaintiffs' constitutional rights.

CONCLUSION

The Sixth Circuit, in reversing the District Court's Order and Injunction, attempted to justify the City's racial quota, by claiming that it serves a supposedly "benign" purpose of remediation for presumed "historical discrimination". Such a judicial finding ignores the inherent inequities and stigmas which accompany a system of allocating benefits and burdens solely on the basis of race.

How can a racial classification which deliberately excludes all members of one race from at least one-half of all supervisory positions be said to be "benign"? At what point does remediation steal across the constitutional boundary and become invidious retribution?

The concept, that for some citizens the promise and the protection of the Equal Protection Clause depends upon whether the deliberate racial discrimination from which they suffer has a "benign" purpose, is a perversion of the Fourteenth Amendment and its judicial history.

Professor Bickel has noted that:

> "The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. *Those for whom racial equality was*

demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution." A. Bickel, The Morality of Consent, 133 (1975).

The Sixth Circuit's October 12, 1979 opinion must be reviewed by this Court because it stands in disregard of the majority view in *Bakke, Weber* and other authorities discussed in this petition. Review is also necessary to resolve growing and significant conflicts among the Circuits on these important statutory and constitutional issues. Review would also facilitate resolution of the constitutional questions implicit in racial quotas imposed by units of government in the name of "affirmative action".

For these reasons, Plaintiffs request that their Petition be granted.

Respectfully submitted,

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APPENDIX

No. 78-1163

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DETROIT POLICE OFFICERS' ASSOCIATION, et al., *Plaintiffs-Appellees,* v. COLEMAN A. YOUNG, Mayor of the City of Detroit, et al., *Defendants-Appellants.*	APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 12, 1979.

Before: CELEBREZZE, LIVELY and MERRITT, Circuit Judges.

LIVELY, Circuit Judge. This appeal is from a judgment of the district court which permanently enjoined the defendants from continuing the operation of an affirmative action program by the Detroit Police Department. The plaintiffs are an association of police officers and a number of white Detroit policemen who were passed over for promotion to the rank of sergeant when black officers with lower numerical standings on the eligibility list received promotions. The district court found that the affirmative action program offended the equal protection clause of the Fourteenth Amendment and violated 42 U.S.C. § 1981, Section 601 (Title VI) of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), and Section 703(a) and (j) (Title VII) of the 1964 Act, 42 U.S.C. § 2000e-2(a) and

(j) (1976).[1] The memorandum opinion of the district court appears at 446 F.Supp. 979 (E.D. Mich. 1978). All defendants have appealed.

I.

It is undisputed that in 1968 the total black component of the Detroit police force was between four and five percent. The percentage of black sergeants and higher ranking officers

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[1] 42 U. S. C.:

§ 1981.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 2000d.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

§ 2000e-2.

(a)

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(j)

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin

was even less.[2] In the wake of tragic civil disturbances in Detroit in July 1967 the community's attention turned to improving race relations in Detroit.

Widespread alienation of black residents from the Detroit Police Department was one problem identified by city leaders. Two groups, a Mayor's task force and a police advisory group, were formed to recommend changes in personnel policies which could contribute to the solution of this problem. The advisory group, the "Vickery Committee," was composed of personnel administrators and psychologists from private industry. Believing that "any incident involving the police might serve to incite a civil disturbance of the kind experienced in July, 1967," the Vickery Committee recommended to the Department the abandonment of certain qualifications for police employment it found "non-relevant to the actual requirements" of police work.

The Department's liaison with the Committee was Richard Caretti, who was assigned to the personnel section in September 1968. Caretti, who held the position of Deputy Director of Personnel and the rank of Commander at the time of trial, testified extensively. Though never trained as a psychologist, Caretti had both undergraduate and master's degrees in business administration with emphasis on police administration. Prior to his assignment to personnel work Commander Caretti had more than 15 years experience as a member of the Detroit police force, primarily as a precinct officer and detective.

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employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State. section, or other area.

[2] In 1950, one percent of Detroit policement were black, while 16 percent of the city's population was black. In 1960, two percent of police were black, while 29 percent of the city was black.

Caretti testified that immediately after his assignment to the personnel section he became involved in a series of adjustments in the recruiting and hiring practices of the police department. These adjustments, which continued from 1968 through 1973, were intended to improve the ability of black candidates to negotiate the selection process successfully and make the selection procedure more accurately reflect the skills needed for the job of police officer.

For example, one of the early adjustments was the replacement of a 3-1/2 hour written entry level examination with a 12-minute test considered equally effective. This was an interim step recommended by the Vickery Committee. However, both the longer and shorter exams were essentially I.Q. tests which Caretti concluded did not properly measure the skills required of a police officer. He also felt that these tests incorporated cultural biases to the disadvantage of black applicants. The Department later abandoned the I.Q. tests altogether and in 1973 adopted a new test and a "differential regression curve" to grade it. The purpose of the scoring curve was to compensate for bias inherent in such tests by providing different formulae for determining the pass/fail point for white and black applicants.

Efforts to attract additional black candidates were also instituted. Physical requirements for employment, such as blood pressure standards, were changed because they were believed to exclude black candidates and yet had little value in determining physical suitability. Procedures for conducting background investigations of applicants were altered because they created opportunities for racial discrimination in the entry level screening process.

During the same period efforts were made to devise a "promotional model" for promotion from patrolman to sergeant that would be free of bias. The term "promotional model" refers to a total package of factors considered when a candidate stands for promotion. The most heavily weighted ingredi-

ent of the promotional model is a written examination. In 1968 the written promotion exam, like the entry level test, was essentially an intelligence test which principally gauged verbal ability.

Between 1968 and 1973 the Department adopted several different tests for promotions before one was specifically devised for it. Commander Caretti testified that the written examination used for promotion to sergeant in 1973, 1974 and 1976 was the "Furcon" exam which, like the 1973 entry exam, was developed at the University of Chicago. The witness stated that despite all efforts to eliminate bias the written promotional exams retained an adverse impact on black candidates. The examination for promotion to sergeant which was given in December 1973 produced a 72% failure rate among black candidates and a 57% failure rate among white candidates. For the November 1974 examination the black failure rate was 61%; that of the white candidates was 47%. The May 1976 failure rate was 58% for black and 47% for white candidates.

In addition to grades on written examinations the "promotional model" required consideration of other factors: recent performance ratings by superiors, seniority, college credits and veterans' points. During the period under consideration performance at an oral interview was added as a factor. The result of the process was a score which was a composite of grades of all the elements, each element weighted by a predetermined percentage applied to the raw score. An eligibility list was drawn up with a sufficient number of names to fill the projected vacancies. Only candidates who received a raw score of 70 or better on the written exam were listed on the roster. Candidates were listed in rank order according to their weighted composite scores.

The percentages or weights assigned to the various factors were adjusted from time to time. The weight given to the written test was reduced when the oral boards were instituted and, similarly, the percentage of the total grade achievable

by reason of seniority was reduced when that resulting from advanced education was increased. In 1973 the total length of service on the force required to take the written examination for promotion to sergeant was also reduced.

Prior to July 1974 all promotions to sergeant were made in strict numerical order from the eligibility list. However, a new city charter effective July 1, 1974 required the appointment of a Board of Police Commissioners (BPC) which was entrusted with the task of approving police promotions and establishing "policies, rules and regulations" for the police department. At its July 31 meeting the BPC adopted an affirmative action policy by a resolution which directed the Chief of Police, *inter alia,* to eliminate discriminatory hiring practices and to take affirmative action to promote minority candidates from existing promotion lists. The necessity for affirmative action was based on "past and present discrimination in the hiring and promotional policies of the Detroit Police Department . . . ," according to the BPC resolution.

Prior to the adoption of the resolution but nearly six years after the Vickery Committee's report, Detroit had a black population of nearly 50 percent but a police force only 17 percent black. The Department adopted a 50/50 ratio as its goal for staffing at all levels. It was apparent that this goal could not be achieved in the rank of sergeant if the Department followed its past practice of adhering to the numerical order on the eligibility list. This practice had resulted in the advancement of 29 whites but only one black to the rank of sergeant in the round of promotions immediately prior to the institution of affirmative action.

By order of the Chief of Police the eligibility list assembled from the December 1973 sergeant examination was expanded by adding names of persons who had achieved passing grades, but whose composite scores were lower than that of the person whose name stood last on the existing list. At the time the list was expanded all black candidates on the original roster

had been promoted and expansion of the list created a new pool of black candidates. In the promotions which followed black male candidates were selected over some white males who stood higher on the eligibility list.[3] This "dipping" produced approximately equal numbers of new black and white male sergeants from the December 1973 list as expanded. The 50/50 ratio was observed in subsequent promotions following new examinations in November 1974 and May 1976. This was accomplished in each case by passing over white candidates with higher scores and promoting black candidates who stood lower on the roster. No candidate who failed to achieve the minimum exam score of 70 for listing on the eligibility roster was promoted.

II.

THE DISTRICT COURT'S FINDINGS OF FACT

A. Discrimination Against White Officers

The district court made extensive findings of fact, many of which are attacked on appeal as clearly erroneous. In support of its conclusion that affirmative action discriminated against white officers, the court found, "There was, in actuality, two [promotion eligibility] lists, one for white males and one for black males." 446 F.Supp. at 987.

The district court further found that affirmative action promotions resulted in the advancement of less qualified persons, stating:

> The testimony consistently was, and this Court finds to be fact, that the higher a candidate stood on the eligibility register the better qualified and equipped he was to assume the position of Sergeant. The above mentioned witnesses testified, and the Court accepts as fact, that ap-

[3] In compliance with a court order in a separate action a number of female candidates were also promoted each time. *See Schaefer v. Tannian*, 394 F.Supp. 1128 (E.D. Mich. 1974).

plication of the model was intended to, and in fact did, demonstrate relative differences in potential job performance. Further, these witnesses testified, and this Court accepts as fact, that the candidates positioned on the register were not, as defendants claimed, equally qualified or a "pool" of qualified candidates.[26]

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[26] Defendants presented the Court with no evidence, other than bald assertions by Tannian, to support the claim that these candidates were "equally qualified".

446 F.Supp. at 994.

The finding of discrimination against white candidates for promotion was supported by the further finding that from December 1973 through 1976 the examination component of the promotional model conformed with standards promulgated by the Equal Employment Opportunity Commission and "measured relative differences of probable job success between candidates for promotion." *Id.* at 990. In addition, the court found that all of these written exams for promotion to sergeant were job related and content valid.

B. Prior Discrimination Against Black Officers

The district court also made findings which were the basis of its rejection of defendants' claim that affirmative action was justified. The first rejected defense was the contention that prior racial discrimination by the Department warranted remedial affirmative action.

With respect to recent hiring, the district court found that use of the entry level exam beginning in 1973 resulted in random hiring rather than hiring the most qualified applicants. The court found that although the test was not job related, scoring it by use of differential regression equations resulted in hiring black and white applicants in approximately equal numbers. Use of this exam, scored in this way, was found to reflect the racial composition of the city rather than a concern with hiring those best suited to be patrolmen.

Considering the other elements of the "promotional model," the district court found that none was shown to have any disparate impact or to discriminate against black candidates in any way. He specifically found that there was no evidence which showed an intentional discrimination in use of the seniority factor; rather he found that "seniority equally affected blacks as well as whites and that if this factor discriminated it did so against the younger, less senior officers without regard to their race." 446 F.Supp. at 993.

However, the district court also found that, until 1973, the Department's entrance examinations failed a disproportionate number of black applicants. Even after the examination was changed in 1968 and again in 1971 to cure its exclusionary effects, the tests "continued to screen out greater numbers of blacks than whites." 446 F.Supp. at 999. The District Judge stated his conclusion in the following summary:

> . . . until 1973 entry level (hiring) written examinations of the Detroit Police Department may have constituted a source of discrimination against blacks seeking entry into the department because these examinations were heavily weighted on I.Q. type questions, were not job related and tended to fail large numbers of blacks vis a vis whites. However, the evidence also shows that after installation of the Detroit Furcon exams in 1973, no discrimination of any form existed in regard to black applicants for positions as police officers.[60]
>
> [60] At this point in time blacks and whites were passing the entry examinations at approximately the same rate.
>
> 446 F.Supp. at 1000.

The court made no findings regarding defendants' evidence of specific instances of discrimination in the conditions of employment, but concluded that no evidence of discriminatory failure to hire qualified applicants had been presented.

Defendants' statistical evidence of historical hiring discrimination was considered and rejected. The district court divided the data into two groups: the numbers of black and white persons hired from 1944 to 1968, and the numbers of black and white appointees and applicants from 1968 to 1975. It was found that the statistics presented by the defendants failed to show discrimination against black applicants for employment in either the distant or recent past. While noting that the Department had hired relatively small numbers of black officers between 1944 and 1968, the court found the data incomplete. No comparative census data or numbers of applications by race during these years were presented, and the court therefore concluded that these "naked numbers of black and white hired is [sic] susceptible to a multitude of conclusions." *Id.* at 998.

With respect to the years 1968-1975, when census data and the numbers of applications by race were available, the district court found other deficiencies which created a "lack of statistical verity." Therefore the court decided to accord "no weight" to statistical evidence which indicates on its fact a "significant difference" in the success rate of black and white applicants. *Id.*

Past promotional practices were also found not to be discriminatory either in the composition of the promotional models or their application.

The district court made a statistical analysis which showed to its satisfaction that there was no underutilization of blacks by the Department. This analysis consisted of a comparison of the black proportion of the police force with the black proportion of the entire local labor market. The district court found that the bulk of all applicants for police positions came from a tri-county area (Wayne, Oakland and Macomb) in which the combined 1970 population possessing the minimum requirements for police employment was 18.6% black. Treating this as the relevant labor market, the district court found that

a black component of 17.23% in the police department in 1974 did not represent a significant underutilization. The court flatly rejected use of the general population of the City of Detroit, which was about 44 percent black in 1970, as the relevant labor market. The district court neither explicitly rejected nor applied the labor market of the City of Detroit, which in 1970 was about 46 percent black.[4]

C. LEAA Funds

The district court found that a second justification put forward by the defendants for instituting affirmative action was not established. This was a purported danger that grants from the Law Enforcement Assistant Administration (LEAA) were in jeopardy because of police department employment practices. We find no error in this determination, but it is not dispositive of the case.

D. Operational Needs

The third position of the defendants addressed by the district court was the claim that "the operational needs of the department required employment and promotion of greater number of blacks." 446 F.Supp. at 997. The court rejected what it termed the "amorphous claim" that more minority officers were needed to provide effective police service to the Detroit community. This claim was further characterized as follows:

> Stripped to its barest form this argument rests upon the premise that blacks can communicate and cooperate better with blacks than can whites . . . . 446 F.Supp. at 1001.

The court found "no factual basis for this belief" that more black officers would improve police service and was not per-

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[4] The labor market in this instance is defined as Detroit residents age 25 and over who have completed high school.

suaded by evidence offered to show decreases in the crime rate and citizen complaints after affirmative action was instituted. Rather than concluding that affirmative action served the Department's needs, the court believed it a disservice:

> Diametrically opposed to the void of competent evidence concerning the claim that the affirmative action plan improved the overall effectiveness of the department is evidence, which the Court accepts as fact, that the inclusion of race as a promotional criterion damages departmental morale and the quality of work of all officers. The record evidence demonstrates, which the Court accepts as fact, that a police officer's effectiveness, as a professional law enforcement officer both within the department and the community in which he serves, is dependent upon his education, skill, training, attitude and sense of professionalism. The unalterable pigmentation of his skin has no bearing upon these facts and neither enhances nor depreciates his professional enforcement effectiveness. Defendants' claim that operational needs of the department required more blacks on the police force is rejected by the Court as being factually unsupported by any competent evidence.
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> 446 F.Supp. at 1002 (footnote omitted).

III.

THE DISTRICT COURT'S CONCLUSIONS OF LAW

The district court concluded that plaintiffs had made a *prima facie* case of racial discrimination under each theory of liability and that defendants failed to rebut it.

A. Title VII, Title VI and § 1981

Defendants violated § 703(a) of Title VII, the court found, by instituting a promotional plan which discriminated against white candidates by preferring black candidates. The court

held that § 703(j) precluded reliance on racial balancing as a legitimate non-discriminatory reason for the failure to select the white officers for promotion.

The district court equated the operational needs defense with the "bona fide occupational qualification" exception in § 703(e) of Title VII.[5] Because that statute does not include race and color as possible bona fide occupational qualifications, the court concluded that operational needs failed as a legal defense. It believed that the affirmative action plan did not fit Title VII's "limited customer preference exception." 446 F.Supp. at 1005.

The court declined to consider evidence of discriminatory practices prior to March 1972, the effective date of amendments to Title VII which brought municipal governments within its scope. Pub.L. 92-261, 86 Stat. 103. Based on its conclusion that post-Act proof of discrimination was lacking, the court held that the promotion plan violated Title VII by establishing impermissible racial quotas. The court went on to

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[5] 42 U.S.C. § 2000e-2(e):

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

state that even if a court had ordered the plan, the plan would be unlawful because past discrimination is a prerequisite to judicial relief under Title VII. The district court summarized its view of voluntary affirmative action as follows:

> However, even if there had been proof of prior discrimination against blacks, Section 706(g) does not grant the employer, acting alone, the prerogative of fashioning quota type relief. This conclusion is based upon several observations. First, the prohibition of Section 703(a) of Title VII is directed solely to employers and not to the courts. Second, Section 706(g) directs that the courts are empowered to fashion remedies for violations of Section 703(a) and does not grant the same authority to the employer. To be sure voluntary compliance in eliminating unfair labor practices is the central theme of Title VII and is preferable to court action. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). However, installation of remedies designed to correct past unfair labor practices which discriminate against certain racial groups is a far cry from the equitable relief intended by Section 706(g). While Congress recognized that remedies must be fashioned to correct prior discriminatory practices and to cure the ill effects of past discrimination, it was cognizant of the fact that courts alone are in a position to afford due process to all concerned in determining the necessity for and in fashioning such relief. *Reeves* v. *Eaves*, 411 F.Supp. 531 (N.D.Ga. 1976); *Chmill* v. *City of Pittsburgh*, 31 Pa.Cmwlth. 98, 375 A.2d 841 (1977). *Compare*, Michigan Compiled Laws Annotated 37.2210. All will agree that relief in the nature of a quota is extreme and should be approached and imposed only with utmost care and caution in order that such extraordinary relief will be uniform and in existence only so long as is necessary to achieve the intended purpose. An employer who readily admits it has discriminated in its employment practices in the past, intentionally or otherwise, can hardly be placed in a position of trust and confidence on a plateau with the courts

> who, without the stigma of the prior impermissible action, sit unblemished in fashioning relief for such prior discrimination. The reasoning that unless an employer can fashion quota type relief the voluntary compliance theme of Title VII will be subverted is particularly naive. Voluntary quota relief by an employer, as this case evidences, merely changes the racial makeup of the plaintiff class. Accordingly, the Court holds, as a matter of law that quota relief, when fashioned by the employer without the assistance and direction of the court, is not permitted and runs afoul of Section 706(g) of Title VII.
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> 446 F. Supp. at 1010 (footnote omitted).

The above conclusions also led the court to hold that the affirmative action plan violated Title VI and § 1981 as well as Title VII. These conclusions were not discussed.

B. Equal Protection

The plaintiffs also presented a valid constitutional claim, the court found. The rule of strict scrutiny was applied to the affirmative action plan. Referring to its Title VII finding that no proof of prior unlawful discrimination existed, the court decided that no prior constitutional violations justified the plan. The essential element of an equal protection violation, discriminatory purpose or intent, was absent because the record was "absolutely void of prior discriminatory purpose on the part of defendants toward blacks." *Id.* at 1014.

In addition, after concluding that the operational needs defense was based on "provincial beliefs" not borne out by the record, *id.*, the court found that operational needs would not constitute a compelling state interest even if the evidence were otherwise.

> If better public communication would exist by hiring more blacks and promoting more blacks to supervisory positions then the problem lies in a racially motivated populus. In the eyes of this Court catering to such racial

> prejudice cannot be said to be "compelling". On the contrary, the Court would consider it to be pandering. If the defendants' claim of "operational need" can be considered as compelling then apparently any all white community, via the police department, could lay claim to such a "compelling interest" in forming a basis to reject all non-whites.
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> 446 F. Supp. at 1016 (footnote omitted).

The district court's view of race-conscious remedies is summarized by this language in its opinion:

> Until racial discrimination is uprooted from employment practices the seeds of racial harmony will never be sown either in this city or the country. However, the fact that a racial group, *any* racial group, suffered its own special injustice does not make one such group different in the eyes of the law – for the remedy for racial discrimination is not more racial discrimination. In this day and age race is an impermissible criterion for judging either the employee's qualifications or the employer's needs.
>
> *Id.*

IV.

Our discussion is arranged under various headings which, in sum, treat the significant findings and conclusions and cover all the claims and defenses of the parties.

A. Prior Discrimination

The holding of the district court on which this appeal essentially turns is that there was no showing of prior discrimination against blacks by the Detroit Police Department. This conclusion, based on errors of law and an impermissibly restrictive view of the evidence, must be reversed.

The district court's findings of fact are binding on this

court unless they are clearly erroneous. Fed. R. Civ. P. 52(a). However, whether prior discrimination occurred is a conclusion of law based on subsidiary findings of fact. As stated by the Seventh Circuit:

> The statement that discrimination exists for the purposes of establishing liability under Title VII or under the Constitution . . . is as much a conclusion of law as a finding of fact. A distinction must be drawn between subsidiary facts to which the "clearly erroneous" standard applies, and the ultimate fact of discrimination . . . . Accordingly, we will make an independent examination of whether the Police Department's employment practices, as a matter of law, were proscribed under Title VII or the equal protection clause. *United States* v. *City of Chicago*, 549 F.2d 415, 425 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); *See also Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508, 516 (5th Cir. 1976).

Reexamination of the law and evidence reveals that the district court's conclusion that the Detroit Police Department did not engage in unlawful discrimination was erroneous.

1. *Employment Data.* The district court held that statistical evidence of prior discrimination was not entitled to any weight whatever. Statistical evidence of racially disparate impact of employment practices alone may establish a statutory violation. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-8 (1977). Under some circumstances, such evidence may also demonstrate a constitutional violation. See *Village of Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266 and n. 13 (1972).

The evidence in this case showed that "the number of whites appointed far outdistanced the number of blacks appointed" from 1944 to 1968 and from 1968 to 1975 "a significant difference between the number of black and white ap-

plicants and the number of black and white appointees." 446 F.Supp. at 998. However, the court rejected the evidence because of a "lack of statistical verity." *Id.*

The conclusion that flaws in the data deprived it of any probative value is itself flawed. The court dismissed the 1944-1968 data for want of labor market data from the Detroit Standard Metropolitan Statistical Area (SMSA) for the same period. This data would be compared to police employment to determine whether the black proportion of the police department was much smaller than the black component of the labor market, a condition which would support an inference of discrimination.

The rejection of the data on this basis was proper only if the district court's insistence on this metropolitan-wide labor market benchmark was proper. Defendants presented evidence based on city population and city labor market comparisons. For example, their evidence indicated that from 1944 to 1973, new hires by the Department included 13.7 percent blacks. If hiring had conformed to the racial proportion of the Detroit labor market,[6] black new hires would have constituted 23.6 percent of all appointments in that period.

The district court also rejected the statistical evidence because of a lack of "applicant flow data" until 1968 and data reporting errors thereafter. The district court seemed to require proof to a mathematical certainty, but there is no such requirement. *Vulcan Society of N.Y.C. Fire Dept.* v. *Civil Service Commission*, 490 F.2d 387, 393 (2d Cir. 1973). Deficiencies in the data base "may, of course, detract from the value of such evidence," *Teamsters*, 431 U.S. at 340 n. 20, but ordinarily would not obliterate its evidentiary value. There was no indication that the reporting errors accounted for the "striking racial imbalance" indicated by the data. *Vulcan*, 490

[6] See note 4.

F.2d at 392. In short, none of the defects cited by the district court were fatal and it was "unfair to ignore [the figures] entirely." *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1021 n. 6 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

Viewed in the light of all the evidence we hold that the district court's finding that the statistical evidence is "susceptible to a multitude of conclusions," 446 F.Supp. at 998, is clearly erroneous. The court found that the disparity between white and black police employment was "significant" and that the pre-1973 entry level examinations "may have constituted a source of discrimination against blacks." 446 F.Supp. at 1000. A number of black officers testified to the existence of a pattern of specific discriminatory practices which they had experienced and observed. No explanation for the underrepresentation of black officers and sergeants other than systematic exclusion appears on the record.

Even standing alone, the statistical data was evidence of discrimination. As the Supreme Court stated in *Teamsters*, supra:

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.
>
> 431 U.S. at 340 n. 20.

The district court found that the defendants had not presented the proper statistical data, even if it were otherwise reliable. The court concluded that a comparison of the racial proportions of the police force and the Detroit SMSA labor market demonstrated "no 'significant disparity' regarding black

representation on the Detroit Police Department." 446 F. Supp. at 1006. This conclusion is dependent on the court's selection of the Detroit SMSA labor market as "*the* proper labor market for comparison." 446 F.Supp. at 996 (emphasis added).

While the metropolitan labor market may be "*a* proper comparison," *Hazelwood,* 433 U.S. at 308 (emphasis added), the availability of one appropriate benchmark is no warrant for rejection of other data which are also probative. The courts of appeals have recognized the value of other benchmarks and approved the use of city population – a standard specifically rejected by the district court – in cases involving public agencies which provide services citywide. *E.g., Afro American Patrolmens League* v. *Duck,* 503 F.2d 294, 299 (6th Cir. 1974) (police); *Boston Chapter, NAACP, supra,* 504 F.2d at 1020 n. 4, 1027 n. 17 (firefighters, city and metropolitan population); *Vulcan Society, supra,* 490 F.2d at 398 (firefighters); *Erie Human Relations Commission* v. *Tullio,* 493 F.2d 371, 372-73 (3d Cir. 1974) (police).

The selection of the SMSA labor market as the sole benchmark was not warranted on the basis that the Department recruited some officers from outside the boundaries of the city. This is especially true in view of the adoption of a city-residency requirement during the period in question. Rather, the "usefulness [of statistics] depends on all of the surrounding facts and circumstances." *Teamsters,* 431 U.S. at 340. In this case, the fact that the police department had a residency requirement and served a city-only population made a comparison with city population and labor market data eminently proper.

Application of these benchmarks indicates a gross disparity between black employment in the Department and black representation in the city's labor market and general population. In 1974, the Department was 17.23 percent black, the district court found. Data from the 1970 census show that the

Detroit labor market was 45.8 percent black and the city population was 43.7 percent black.

The metropolitan labor market was only 18.6 percent black in 1970. But the district court's comparison of 1970 census data, the most recent available, to 1974 police employment could not refute the pattern of racial disparity standing alone. If general population trends were any guide, it was distinctly possible that by 1974 the metropolitan labor force had become increasingly black. Thus, 1970 census data could not be compared fairly with 1974 police employment data. A proper comparison, between 1970 labor market and police statistics, yields a significant disparity. The metropolitan labor market was 17.23 percent black in that year while the Department employed only 11 percent black officers.

2. *Prior Discrimination: The Title VII Claim.* The district court rejected the defense of prior discrimination in part because

> . . . statistics regarding pass/fail rates on the entry examination antedating March 24, 1972 are inconsequential in determining if there had been a prior Title VII violation. Further, as the Findings of Fact demonstrate, shortly after March 24, 1972, there was no disparate impact upon blacks as a result of entry examinations or any other portion of the entry process.
>
> 446 F. Supp. at 1006 (footnote omitted).

March 24, 1972 is the effective date of Pub. L. 92-261, 86 Stat. 103, which amended Title VII to include "governments, governmental agencies [and] political subdivisions." 42 U.S.C. § 2000e(a). The district court relied on *Hazelwood, supra,* for the proposition that a governmental employer who provides equal employment opportunities on that date and thereafter cannot be held liable solely on the basis of prior discrimination. 433 U.S. at 309.

However, the Supreme Court in *Hazelwood* made clear that only a public employer who "made *all* its employment decisions in a *wholly* nondiscriminatory way" after the effective date of the Act would be immune from liability. *Id.* (emphasis added). In a footnote to the portion of the opinion quoted by the district court, the Supreme Court wrote:

> This is not to say that evidence of pre-Act discrimination can never have any probative force. Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decisionmaking process had undergone little change.
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> 433 U.S. at 309-310 n.15.

Where there is at least some evidence of post-Act discriminatory practices and effects, pre-Act evidence of a similar nature is relevant to the conclusion of post-Act discrimination. If there is no evidence of post-Act discrimination, the public employer cannot be held liable under Title VII.

There was evidence of post-Act discrimination in this case which made the evidence of pre-Act employment practices relevant. The district court conceded that it was not until "shortly after" the effective date of the Act that the Department was able to eliminate the racially disparate impact of the hiring process. 446 F.Supp. at 1007. In fact, it was not until 1973 that the unvalidated entry level exam which failed greater numbers of black than white applicants was finally abandoned. See 446 F.Supp. at 1000. In addition, changes in other aspects of the entry level hiring process which had racially disparate effects or afforded opportunities for discrimination continued until 1973.

Moreover, discriminatory acts which might not give rise to legal liability may nonetheless be sufficient to justify a voluntary remedial affirmative action plan. Thus evidence of pre-Act

discrimination in the present case was relevant to a legitimate defense. The test under Title VII of voluntary affirmative action is whether the action is consistent with the anti-discrimination policy of the statute. See *United Steelworkers of America* v. *Weber*, —— U.S. ——, 47 U.S.L.W. 4851 (June 27, 1979). Prior discrimination which would constitute a violation but for the effective date of the statute is cognizable in concluding that the employer's purpose in implementing affirmative action was consistent with the statutory purpose of eliminating discriminatory employment practices and their effects. When the question is what a public employer *may* do rather than what it *must* do, evidence of pre-Act discrimination is relevant to the propriety of ostensibly remedial racial preferences.[7]

In *Weber*, the Supreme Court rejected many of the legal principles on which the district court based its decision. The Court held that Title VII does not prohibit all remedial, race-conscious affirmative action plans. —— U.S. at ——, 47 U.S.L.W. at 4852. The district court in this case relied heavily on the court of appeals decision in *Weber* in concluding that Section 703(j) of Title VII required rejection of defendants' claim that racial balancing is a permissible reason for employment preferences. 446 F.Supp. at 1004.

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[7] Appellees argued in a supplemental brief that Title VII has a different meaning when applied to governmental employers than when applied to private employers. This argument rests on the theory that the commerce clause was the source of legislative power for the original version of Title VII (which applied only to private employers), but the enforcement clause of the Fourteenth Amendment was the source of congressional power in enacting the 1972 amendments to Title VII which brought public employers within the scope of the statute.

This argument was considered recently by the Fifth Circuit in *Scott* v. *City of Anniston*, 597 F.2d 897 (1979). That court correctly decided that "whether the employer be private or public, the same prerequisites to Title VII liability apply . . . ." 597 F.2d at 900. We agree that reliance on the Fourteenth Amendment as the source of legislative power for the 1972 amendments does not limit their substance to the minimum protections provided by the Fourteenth Amendment. See also *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966).

In reversing the court of appeals in *Weber*, the Supreme Court found that Section 703(j) states only what Title VII does not *require* of an employer. That section contains no explicit prohibition against voluntary employer action. The Court found a "natural inference" from this omission that Congress chose not to forbid all voluntary race-conscious affirmative action. — U.S. at —, 47 U.S.L.W. at 4854.

The district court also relied on *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), in concluding that Title VII prohibits the implementation of an affirmative action plan which in any way prefers black employees over white. 446 F.Supp. at 1003. However, in *Weber*, the Supreme Court held that *McDonald* expressly left this question open. — U.S. at —, 47 U.S.L.W. at 4853. Further, it found that a principal purpose of Title VII is to induce voluntary solutions to racial discrimination, one form of which is race-conscious affirmative action employment. In view of the statutory purpose, § 703(a) and (d) cannot be read as literal, absolute prohibitions against race-conscious action to eliminate discrimination. — U.S. at —, 47 U.S.L.W. at 4853-54.

The basic error in the district court's approach to the Title VII issue was that it determined what the Act requires of employers and then concluded that all other actions with racially disparate consequences are forbidden. But as the Supreme Court made clear in *Weber*, in a case of this kind where "reverse discrimination" is claimed, the question is not what Title VII requires or what a court might order to remedy a proven Title VII violation. Rather, the question is what voluntary actions may lawfully be taken. As Justice Blackmun noted in his concurring opinion in *Weber*, a preferential hiring plan which seeks to alleviate an imbalance caused by traditional practices of job segregation is a reasonable voluntary response "whether or not a court, on these facts, could order the same step as a remedy." — U.S. at —, 47 U.S.L.W. at 4856. Under *Weber*, the district court's holding that "quota relief, when

fashioned by the employer without the assistance and direction of the court is not permitted . . . ," 446 F.Supp. at 1010, cannot stand as a matter of law.

Consideration of the uncontroverted evidence before the district court and the very findings made by the court compel the conclusion that the Department was guilty of racial discrimination in violation of Title VII. Hiring data spanning the period 1944 to 1975 demonstrated a consistent, "signficant" racial disparity. Police work force statistics revealed a gross underrepresentation of black police officers when compared with city population, city labor market, and proper metropolitan labor market data.

No nondiscriminatory explanation for these disparities was offered. On the contrary, there was substantial evidence that the Department had a "custom" or "tradition" of racial discrimination in job assignments, conducted unvalidated entry tests with racially disparate effects, maintained physical job requirements with discriminatory impact, and created opportunities for racial discrimination in the background investigation of job applicants.

In addition, where judicial findings of discrimination in a particular job category are so numerous as to be a proper subject for judicial notice, affirmative action is permissible. *Weber*, — U.S. at —, 47 U.S.L.W. at 4852 n. 1. Racial discrimination by law enforcement agencies in the employment of police officers has resulted in numerous findings of unlawful discrimination. See, e.g., *Afro American Patrolmens League* v. *Duck*, 503 F.2d 294 (6th Cir. 1974); *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); *Erie Human Relations Commission* v. *Tullio*, 493 F.2d 371 (3d Cir. 1974); *Mims* v. *Wilson*, 514 F.2d 106 (5th Cir. 1975); *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. en banc), *cert. denied*, 419 U.S. 895 (1974); *NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974); *United States* v. *City of*

Chicago, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); see also President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: The Police* 169, 174 (1967) (citing surveys which found racially exclusionary hiring practices and racially discriminatory job assignments in Detroit Police Department).

Based on the findings of the district court and uncontroverted evidence of prior discrimination by the Department we conclude that the affirmative action program did not violate Title VII. See *Weber, supra.*

3. *Prior Discrimination: Title VI and § 1981.* The district court did not explain its holding that the affirmative action plan violated Title VI. It apparently concluded that a public entity which receives federal funds may not establish any race-conscious preference program even to remedy past discrimination. We find this reading of 42 U.S.C. § 2000d to be too expansive.[8]

The Supreme Court has held that states may take voluntary race-conscious action to achieve compliance with the law. *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977) (reapportionment); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971) (school desegregation). Moreover, the Constitution imposes on states a duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination. *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15 (1971); *Green* v. *County School Board*, 391 U.S. 430, 437-38 (1968). The district court erred in holding that only a court can effect a remedy upon a judicial finding of prior discrimination, for as Chief Justice Burger wrote in *Swann*, "Judicial authority enters only when local authority defaults." 402 U.S. at 16.

Title VI must be construed to avoid the conclusion that

[8] Whether Title VI may be the basis of a private cause of action need not be decided because the district court committed an error of substantive law in premising liability on Title VI.

the statute interferes with the operation of the Constitution. It is presumed that Congress did not intend to prohibit state and local governments from performing their constitutional duty to eliminate discrimination and its effects. Therefore, while Title VI may prohibit acts of discrimination, it cannot be read to forbid remedies which are constitutionally required and unavoidably race-conscious.

The validity of the affirmative action plan under Title VI thus turns on whether it was effected to comply with a constitutional duty to remedy prior discrimination. This construction of Title VI is not inconsistent with the view that the statute forbids only that discrimination which offends the Constitution, as expressed by at least four Justices in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978):

> In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment.
>
> 438 U.S. at 287 (Opinion of Powell, J.). We agree with Mr. JUSTICE POWELL, that as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself.
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> 438 U.S. at 325 (Opinion of Brennan, White,[9] Marshall and Blackmun, J.J.).

The district court also held without explanation that the affirmative action plan violated 42 U.S.C. § 1981. Apparently, the court interpreted the statute as a prohibition of all race-conscious programs without regard to whether they fulfill a constitutional duty to remedy past discrimination.

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[9] Justice White would hold that Title VI provides no private cause of action and would not reach its merits. See 438 U.S. at 287.

Section 1981 is derived from the Civil Rights Act of 1866. That Act was intended to implement the Thirteenth Amendment and eliminate the vestiges of slavery. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439-440 (1968). The statute also has a close relationship to the Fourteenth Amendment. The statute was a model for the Amendment, *Mahone* v. *Waddle*, 564 F.2d 1018, 1029-30 and n. 21 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978), and was reenacted after approval of the Amendment. Enforcement Act of 1870, Ch. 114, § 18, 16 Stat. 144; See *Jones*, 392 U.S. at 436.

What the Constitution forbids generally, § 1981 forbids with some specificity. The constitutional genesis of § 1981 also means that what the Constitution permits, § 1981 must also permit. Because the Constitution not only permits but requires race-conscious action to remedy a constitutional violation, it was error to hold that § 1981 bars such action.

4. *Prior Discrimination: The Constitutional Claim.* The district court held that no race-conscious affirmative action program was permissible unless the defendants proved by unequivocal direct evidence that any disadvantages suffered by black applicants and candidates for promotion resulted from purposeful, intentional discrimination. Typical of several statements to this effect is the following:

> Aside from statistical comparisons defendants have claimed that prior to the installation of the voluntary "affirmative action" plan blacks were treated differently than whites, essentially a claim of disparate treatment. While there was no evidence in this record showing such an allegation to be true, even if defendants had shown prior differential treatment to blacks vis a vis whites the claim of prior unconstitutional discrimination against blacks, without more, would fall short of a constitutional violation as it must be shown that the alleged differential treatment was *because* of the race of the group. Proof of discriminatory *purpose, intent, or motive,* be it evil or in-

> nocent, is required and absent such proof, as in the case at bar, there can be no constitutional violation.
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> 446 F.Supp. at 1013-14 (footnote and citation omitted).

The district court relied primarily on *Washington* v. *Davis*, 426 U.S. 229 (1976), and quoted extensively from the majority opinion. *Washington* v. *Davis* holds that proof of discriminatory purpose or intent is required to establish a constitutional violation and that proof of disparate racial impact from state action is not alone sufficient. This requirement applies to allegations of racial discrimination in various factual contexts. 426 U.S. at 239-41.

However, the district court failed to follow those portions of the Supreme Court's opinion which give guidance on evaluating proof of discriminatory purpose:

> This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).
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> • • •
>
> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply

> because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.
>
> 426 U.S. at 241-42.

In *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266-68 (1977), the Supreme Court set forth a number of "subjects of proper inquiry in determining whether racially discriminatory intent existed." The racial impact of the official action was identified as "an important starting point." The historical background of decisions having disparate racial impact and the contemporary statements of members of the decision-making body were also types of evidence considered relevant. The Court quite recently reviewed the standard of proof for constitutional violations and held that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." *Columbus Bd. of Education* v. *Penick*, —— U.S. ——, 47 U.S.L.W. 4924, 4928 (July 2, 1979). The foreseeable effects standard may be employed "as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn." *Id.* In short, discriminatory intent may be established by any evidence which logically supports an inference that the state action was characterized by invidious purpose.

The district court erred in treating evidence of disparate impact of hiring and promotion practices as having no probative value. It found no relevance in the longstanding and gross underrepresentation of blacks on the Detroit police force. Its suspicions were not aroused by its own finding that the pre-1973 entry level written examination had serious flaws which tended to work against black applicants.

The court similarly erred in finding that there was no evidence on the record of disparate treatment. 446 F.Supp. at 1013. In light of uncontradicted evidence of discriminatory

treatment in job assignments, this finding was clearly erroneous. There was uncontradicted evidence that the traditional practice of the Detroit police department had been to assign black officers to foot patrols only, denying them the use of patrol cars for years. After assignment of black officers to scout cars was begun, there were "white" and "black" cars. If the only black car was in use or out of operation black officers were required to walk rather than being permitted to use a white car. Black officers were permitted to work only in black neighborhoods. It was also uncontradicted that the traditional practice had been to exclude black officers from assignments to certain desirable details. Further, black officers were rarely given visible posts at headquarters and for many years black and white officers were never paired.

The natural consequence of these practices was to make police work unattractive to blacks and to limit the experience of blacks who were employed as police officers in ways which could hinder their chances for advancement. No nondiscriminatory explanation was given for any of these practices. On the contrary, past and present uniformed police officers and civilian officials were convinced that these practices represented purposeful discrimination. Unlike the district court, we believe that evidence of these practices and their consequences was entitled to serious consideration.

When veteran police officers attempted to state the reasons for these practices as related to them by their former police supervisors, the evidence was excluded as hearsay. Thus, while the district court required proof of discriminatory purpose, it excluded the most probative evidence on the issue: contemporaneous statements by persons in positions to know the purpose of the Department's traditional practices. Exclusion of this evidence of discriminatory purpose as hearsay was error under the Federal Rules of Evidence. Rule 803(3)[10]

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[10] Rule 803(3) states:

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emo-

makes such testimony admissible as an exception to the hearsay rule, regardless of whether the declarant is available as a witness.

The City's own determination that it had been guilty of racial discrimination in the past was also entitled to more serious consideration than the district court gave it. The resolution approved by the Board of Police Commissioners conceded the role of prior discrimination in creating the Department's racial imbalance. In light of this admission, the statistical evidence of disparate impact, the tradition of discriminatory treatment and the testimonial evidence of discriminatory purpose, we believe it was error for the district court to require the city to prove specific acts of discrimination and produce the individual victims of these acts.

We have no such clear authority in dealing with the constitutional issues as *Weber* supplies with respect to Title VII. However, we conclude that the opinion of Justices Brennan, White, Marshall and Blackmun in *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 324, offers the most reasonable guidance. Applying the principles set forth in that opinion, we conclude that the district court committed a number of errors of law.

Thus it was error to require proof that the persons receiving the preferential treatment had been individually subjected to discrimination, for "it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." *Bakke, supra,* 438 U.S. at 363.

And, rather than requiring a direct showing of past intentional discrimination by the City of Detroit against identified individual black applicants for hiring and promotion, the district court should have determined first whether appropriate

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tion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

findings were made by a public body "with competence to act in this area." *Id.* at 325.

It was also error to require that there be judicial determination of past discrimination for a state to undertake a race-conscious remedy, as stated by the district court. This requirement would be "self-defeating" and would "severely undermine" voluntary remedial efforts. *Id.* at 364.

It is apparent that the district court misapprehended the nature of remedial race-conscious action and failed to conduct the proper inquiry into such action. As the four Justices wrote in *Bakke,* earlier cases involving discrimination against minorities are often inapposite and a more precise meaning of "strict scrutiny" is required when considering state action taken for the purpose of remedying past discrimination. 438 U.S. at 357.

Thus it appears that, rather than requiring a direct showing of past intentional discrimination by the City of Detroit against identified individual black applicants for hiring and promotion the district court should have considered the finding by the BPC, a public body with competence to act. This should have led to the following inquiries, at least: whether "there is a sound basis for concluding that minority underrepresentation is substantial and chronic and that the handicap of past discrimination is impeding access [and promotion] of minorities . . ." *Id.* at 362; whether any discrete group or individual is stigmatized and whether use of race is reasonable in light of the objectives of the plan. *Id.* at 373-76. If this analysis establishes the need for remedial action, the test of reasonableness requires a showing that no other approach offers a practical means of achieving the ends of the program in the foreseeable future. *Id.* at 376. If the affirmative action plan satisfies these criteria, it does not violate the Equal Protection Clause of the Fourteenth Amendment. The district court conducted none of these inquiries, and its finding that the affirmative action program violated the constitutional rights of the plaintiffs must be reversed.

B. Operational Needs

The defense of operational requirements is claimed by the defendants to be an independent justification for the affirmative action plan.[11] The basis of the claim is that improved law enforcement is a sufficiently important reason in itself for affirmative action.

As noted above, the district court gave little consideration to the testimony of high-ranking police officers that a more representative black presence on the Detroit force was required. The court referred to the "provincial beliefs" on which the claim was based and characterized the argument as a simplistic claim that blacks communicate better with blacks.

The argument has considerably more substance. It is based on law enforcement experience and a number of studies conducted at the highest levels. *E.g.*, National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973); National Commission on the Causes and Prevention of Violence, Final Report: *To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the National Advisory Commission on Civil Disorders (1968); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967). As these reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. See *To Establish Justice, supra* at 145; *Report on Civil Disorders, supra* at 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. *Report on Civil Disorders, supra,* at 301; *Task Force Report: The Police, supra* at 144-45, 167; *Police, supra,* at 330.

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[11] The district court believed that defendants also intended to assert operational needs as a defense to Title VII under Section 703(3), which provides for a limited statutory exception based on "bona fide occupational qualifications." However, the argument seems to us intended as a defense to the claimed equal protection violation rather than the Title VII claims.

These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the "Wickersham Commission." *Report on the Causes of Crime* 242, National Commission on Law Observance and Enforcement (Vol. I, 1931).

In 1967, a presidential commission stated the proposition offered by the defendants in this case:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.
>
> *Task Force Report: The Police, supra* at 167.

This need extends to the higher ranks in police departments, such as the rank of sergeant involved in this case:

> If minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policymaking and other crucial decisions.
>
> *Id.* at 172.

The presence of a mostly white police force in minority communities can be a "dangerous irritant" which can trigger, as it did in Detroit in 1967, a violent response. *Report on Civil Disorders, supra* at 315, 120; see also *id.* at 84-108 (chronology of events of 1967 Detroit civil disorders).

The testimony of defense witnesses in this case was completely consistent with the findings of these studies and with the view widely accepted in law enforcement that a police force must reflect the makeup of the community it serves. Former Police Commissioner John F. Nichols testified to a keen awareness of "the community requirement and the sociopolitical reality that required a higher percentage of black

officers to be made a part of the Department." Chief of Police William H. Hart testified that this need involves the trust between a community and its police force and that representativeness is essential to citizen cooperation and crime prevention. He also stated that the need is much deeper than a perception that persons of the same race communicate better with each other than with someone from a different racial group. James Bannon, Executive Deputy Chief with 28 years of experience on the force and a doctoral degree in sociology, also testified. In addition to his testimony regarding historical discriminatory treatment of black officers in Detroit, he cited both the need for more black officers to perform specialized tasks such as surveillance and the need to improve the community's perception of police. He viewed affirmative action as a tool needed to change an image of the police among black Detroit residents as part of the white establishment with little interest in their problems.

The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions. It is therefore apparent that the district court misconstrued this justification for affirmative action, and that the justification offered by defendants is a substantial one.

C. The 50/50 Promotion Ratio

Because the district court focused on other issues, the record is incomplete with respect to the propriety of the 50/50 promotional ratio adopted by the Department. The

test to be applied is whether the voluntarily adopted ratio is reasonable.

The reasonableness test includes a determination whether the affirmative action plan is "substantially related" to the objectives of remediation of prior discrimination and improved law enforcement. *Bakke, supra* at 359. A racial preference plan is reasonable when it provides an effective remedy for past discrimination without unnecessarily trammeling the interests of white candidates for promotion. *Weber, supra,* —— U.S. at ——, 47 U.S.L.W. at 4855. The reasonableness test has been applied by the federal courts on review of quotas ordered by trial courts. See, *e.g., Tullio, supra,* 493 F.2d at 374-75; *Carter* v. *Gallagher,* 452 F.2d 315, 330-31 (8th Cir. 1971) (en banc), *cert. denied,* 406 U.S. 950 (1972); see also *United States* v. *Chicago, supra,* 549 F.2d at 436-37 (abuse of discretion standard).

On remand, the district court must consider the factors enumerated in *Weber, supra.* It must consider the urgency of effectuating the state's objectives, practical limitations in doing so, and the degree of hardship to be borne by whites. However, concern for the interest of white employees cannot be allowed to thwart achievement of the state's goals. It is reasonable for some persons innocent of wrongdoing to bear some burden[12] in order to correct the harsh effects of a grievous wrong of constitutional dimensions and enhance public safety by improved law enforcement. See *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747, 774-75, 777-78 (1976); see also *Teamsters, supra.*

The district court should also consider that a goal which seeks the same racial proportion among employees as in the labor force will ordinarily be reasonable. "[A]bsent explana-

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[12] This is not a case in which white employees are deprived of vested employment rights. At most, the white patrolmen had an expectation of promotion under certain conditions. These conditions were altered by the BPC under authority of the City Charter. See *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747, 778 (1976).

tion, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters, supra,* 431 U.S. at 340 n. 20. Although no one can say with absolute precision how much of the Department's racial disparity in employment is due to racial discrimination, logic and fairness require a presumption that where racial discrimination has been purposeful and pervasive, all racial imbalance within the discriminating organization occurred as its result. See *Keyes* v. *School Dist. No. 1,* 413 U.S. 189, 198-205 (1973).

Thus a ratio requirement equivalent to the racial proportion of the labor market ordinarily achieves the racial balance which would have existed but for discrimination.

V.

CONCLUSION

The basic holding of the district court which appears to have been decisive in its treatment of all claims and defenses is that there was no showing of prior discrimination by the Detroit Police Department. We believe this conclusion is based on an impermissibly restrictive view of the proof in the case. Thus, while conceding that the entry level examinations used prior to 1973 "may have constituted a source of discrimination against blacks," the court concluded that affirmative action was forbidden because no discrimination existed after installation of the Detroit Furcon exams in that year. This holding overlooks completely the continuing effect of the pre-1973 exclusionary practices. These practices had the effect of freezing the status quo. The fact that job-related, non-discriminatory examinations for sergeant were instituted in 1973 did not deprive the City of the power to deal with the lingering effects of past discriminatory practices.

We have not discussed every argument made by the parties and *amici curiae*. To do so would unreasonably extend what is already a lengthy opinion. However, we have treated the issues which are central to a decision of this particular case.

The judgment of the district court is reversed and the injunction entered by it is vacated. All claims of the plaintiffs based on the contention that the affirmative action program for promotion to sergeant violates Title VI, Title VII and § 1981 are dismissed. The case is remanded for further consideration of the constitutional issues. This will require a determination of whether it has been established that the Department engaged in intentional discrimination against blacks, and if not, whether the affirmative action plan is justified under the alternative claim of operational needs. The District Judge to whom the case is assigned will determine whether further proof is required.

If the court concludes that prior acts of the Department did deprive blacks of rights guaranteed them under the equal protection clause, it must then determine whether the affirmative action plan, with its 50/50 ratio, was a reasonable remedial response. *Bakke* and *Weber* make it clear that a case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain, and the official actions complained of must be subjected to the analysis prescribed in *Weber* and the plurality opinion in *Bakke* which we find controlling.

In the event the district court concludes that the affirmative action plan may remain in force, it will be necessary to determine a formula for its eventual termination. In approving the plan in *Weber*, the Supreme Court noted that it was a temporary measure to eliminate a manifest racial imbalance, not a measure to maintain a given balance. *Steelworkers* v. *Weber, supra,* — U.S. —, 47 U.S.L.W. at 4855. Unless the parties are able to agree on provisions for termination of the plan in event of its approval, this will be an ingredient of the final judgment.

DETROIT POLICE OFFICERS ASSOCIATION, a Voluntary Mutual Benefit Association, Labor Organization, Plaintiff,

v.

Coleman A. YOUNG, Mayor of the City of Detroit, Philip G. Tannian, Chief of Police of the Detroit Police Department, Avern Cohn, Susan Cooper, Charles Butler, Edward Littlejohn and Alexander Ritchie, Members of the Board of Police Commissioners and the City of Detroit, a Municipal Corporation, Defendants.

William MORGAN, Brian Brunett, and Donald Prince, Individually and as Representatives of a Class, Plaintiffs,

v.

Coleman A. YOUNG, Mayor of the City of Detroit, Philip G. Tannian, Chief of Police of the Detroit Police Department, Avern Cohn, Susan Cooper, Charles Butler, Edward Littlejohn and Alexander Ritchie, Members of the Board of Police Commissioners and the City of Detroit, a Municipal Corporation, Defendants.

Civ. A. Nos. 74-71838 and 75-71376.

United States District Court,
E. D. Michigan, S. D.

Feb. 27, 1978.

District Court Opinion

MEMORANDUM OPINION

KAESS, District Judge.

The above entitled actions arise out of separate civil rights complaints alleging discriminatory promotional practices on the part of the City of Detroit and other named individual defendants. The complaints and amendments in both actions charge defendants with violations of 42 U.S.C. §§ 1981, 1983, 1985(3), 2000d *et seq.*, 2000e *et seq.*, the Fourteenth Amendment of the United States Constitution, Article I, Section 2 of the Constitution of the State of Michigan and various state civil rights statutes. Specifically, plaintiffs allege that the promotional practices within the Detroit Police Department resulted in white male police officers being intentionally passed over for promotion to the rank of Sergeant solely because of their race.

On November 18, 1976, the Court certified, pursuant to Rule 23 of the Federal Rules of Civil Procedure, the individual plaintiffs' suit as a class action.[1] Thereafter, on March 29, 1977, the Court entered an Order consolidating the above entitled cases for trial.[2]

A preliminary injunction was issued on May 27, 1977, enjoining defendants herein from making further promotions to the rank of Sergeant in accordance with the affirmative action program of the Detroit Police Department. The injunction required all further promotions to be made in strict numerical ranking as established by the current sergeants promotional

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[1] The class certified was defined as follows:

> "All past, present and future qualified white Detroit Police Officers below the rank of Sergeant who, since April of 1974, have been or will be denied, because they are white, their timely promotions to the rank of Sergeant."

[2] The D.P.O.A. suit had been originally assigned to District Judge Lawrence Gubow. However, by mutual agreement between Judge Gubow, this Court and all parties, the matter was reassigned to this Court pursuant to Local Rule IV(c); *See* Rule 42(a), Federal Rules of Civil Procedure.

register. On June 23, 1977, the United States Court of Appeals for the Sixth Circuit entered an Order dissolving the preliminary injunction and remanded the cause for a prompt hearing and determination on the merits.

Upon remand the Court, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, entered an Order bifurcating trial on the issues of liability and damages. Trial of the consolidated actions on the issue of liability began on August 8, 1977, and concluded on December 22, 1977. All parties have rested and final arguments have been made and received.

The following constitutes the Court's Findings of Fact and Conclusions of Law as required by Rule 52(a), Federal Rules of Civil Procedure.

FINDINGS OF FACT

The Disputed Promotions

On November 1, 1973, notice was given by the Detroit Police Department that a promotional examination for the rank of Sergeant would be given. The notice provided eligibility requirements and stated, *inter alia*, that eligible candidates would be permitted to write the examination and receive their "merited" position on the promotional register.[3] The notice also provided that officers would be selected to attend Officer Candidate School in descending order according to their position on the eligible register.

On December 16, 1973, the written examination for promotion to the rank of Sergeant was administered to eligible police officers of the City of Detroit by the Detroit Police Department. On April 9, 1974, a list of applicants eligible for the position of Sergeant, arranged in descending order of their total composite score, after application of the promotional

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[3] 70% was the designated minimum passing score on the written examination. Thus, any candidate who did not achieve 70% was excluded from further consideration in the promotional process. The cut-off score has never been a subject of dispute in this litigation.

model,[4] was caused to be prepared and resulted in Personnel Order 74-108. The order provided that applicants for promotion will be promoted in the order that they appear on the eligibility register provided they are in compliance with specified college requirements or seniority requirements. Thus, if an applicant had not met the college or seniority requirements prior to graduation from Officer Candidate School he would be passed over for promotion. Likewise, if an officer selected from the eligibility register did not successfully complete Officer Candidate School, he too would be passed over as successful completion was a prerequisite to confirmation to the rank of Sergeant. The names of 298 officers appeared on the eligibility register.

On May 9, 1974, Police Commissioner Philip Tannian authorized the first set of promotions to be made from eligibility register 74-108. These promotions, totalling thirty (30), were made in strict descending numerical order and were racially composed of twenty-nine (29) caucasians and one (1) noncaucasian. Subsequently, on June 7, 1974, Personnel Order 74-108 was amended and the eligibility register for Sergeant was extended by the addition of 77 police officers, numbers 299-375, inclusive. The names of these eligible officers were again arranged in descending order according to their weighted composite scores after application of the promotional model. The amendment provided that promotions from the eligibility register will be made in accordance with the provisions of the new City Charter.[5] It was also on this date that Commissioner Tannian rescinded a prior order which stated that promotional candidates will be selected to attend Officer Candidate School in the order of their position on the eligibility register, starting at the top of the list.

Thereafter, on August 1, 1974, a second set of promotions to the rank of Sergeant was made from eligibility register 74-

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[4] The promotional model and composite scoring are discussed, at page 988, *infra*.

[5] Charter of the City of Detroit, § 7-1114, effective July 1, 1974.

108. These promotions, again totalling thirty (30) were not made in strict numerical order as the names appeared on the April, 1974 eligibility register but instead involved passing over approximately 200 white officers with higher composite scores and standing on the eligibility register. Of the thirty (30) promotions, twenty-five (25) went to male officers and five (5) were bestowed upon females. All twenty-five (25) officers promoted were black and ranged in numerical rank on the eligibility register from # 36 to # 264.

The third set of promotions to the rank of Sergeant from the eligibility register, and its extension, were made on October 11, 1974. Of the thrity-three (33) promotions, four (4) were received by females, fifteen (15) were awarded to white males and fourteen (14) were awarded to black males. Excluding the female promotions from consideration, the white male promotions were made in strict numerical order according to their respective positions on the eligibility register. While the black male promotions were apparently made in the same manner this process required selection of every remaining black male on the eligibility register and its extension. There was, in actuality, two lists, one for white males and one for black males. The positions of the black male officers promoted ranged from # 276 to # 375, the last number on the list, and required the passing over of every remaining white male.

The 1974 eligibility register was amended for a second time on January 6, 1975, extending the eligibility register for the rank of Sergeant to include an additional 125 police officers. These officers ranked # 376 to # 500, inclusive. The personnel order provides the alleged purpose for the extension stating, in part, as follows:

> "In order to provide the department with additional Sergeants and to comply with the affirmative action resolution as adopted by the Board of Police Commissioners on July 31, 1974, it is necesary to extend the eligibility register for the rank of Sergeant.

> The register has been extended to the position 500 to insure that a sufficient number of officers are available for promotion prior to the publishing of a new eligibility register." (Exhibit 6)

The true reason why the eligibility register was extended was to have more *black male* officers available for promotion since the prior promotions had exhausted all eligible black male candidates. It was not to insure the department that there would be "sufficient" officers available. The only purpose of the extension was to insure the department that there would be sufficient *black male* officers available.[6] This fact is evidenced by the exhibit itself as only black males were promoted from the extension.

Promotions were again made from the 1974 eligibility register and its extensions on February 12, 1975. Of the twenty (20) promotees, four (4) were females, eight (8) were black males and eight (8) were white males. The male promotions were made by selecting the eight (8) highest ranking black and white officers on the original register and its extensions. Naturally, all the black males were positioned on the second extension. The white males promoted ranged from # 49 to # 57 on the eligibility register while their black counterparts ranged from # 376 to # 414 on the second extension.

The fifth, and final, set of promotions from the eligibility register and its two extensions were made on March 27, 1975. Thirty-six (36) promotions were awarded. Three (3) promotions were awarded to females, eighteen (18) to white males and fifteen (15) to black males. The white male promotions were again made in strict numerical order according to their position on the eligibility register. The black male promotions were made in the same manner and again required the selection of every black male on the second extension. The lowest ranking white male promoted was # 79 while the lowest ranking black male was positioned at # 494.

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[6] Reluctantly, Tannian corroborated this fact.

On September 10, 1974, notice of a second promotional examination for promotion to the rank of Sergeant was given to police officers. The notice provided that the attained position on the eligibility register was a "merited position". However, the language stating that officers would be selected for promotion by starting at the top of the list was deleted. The written examination was administered on November 17, 1974. After the examination was scored and the promotional model applied, a new eligibility register for promotion to the rank of Sergeant was released, Personnel Order 75-352. The candidates were arranged in descending order according to their accumulated promotional score. The register represented that the candidates would be promoted in accordance with the "needs of the department" as determined by the Chief of Police and the Affirmative Action principles supported by the City Charter, Board of Police Commissioners and department policy. The expiration date of the register was June 30, 1976.

Three sets of promotions in 1976 were made from this eligibility register and resulted in 127 total promotions. A breakdown of the three sets of promotions reveals that each time an equal number of black males and white males were promoted. Specifically, the total shows the composition to be as follows: 59 black males, 59 white males, 9 females. As with the 1974-1975 promotions, the process of selecting officers to be promoted was not by true or strict numerical rank but was in fact done by coding the eligibility register by race and sex and then, in a descending order, selecting an equal number of black males and white males from each group. The last white male promoted pursuant to this practice was # 70 while the last black male promoted was # 342.

On May 23, 1976, the third promotional examination for promotion to the rank of Sergeant was administered. Again, prior notice was given stating that the attained position on the eligibility register was a merited one but that promotions would be made "pursuant to the needs of the department". The eligibility register, which was released on December 28,

1976, was arranged in descending order according to the total accumulated score of each candidate after application of the promotional model. The list included 460 officers. Its expiration dated was stated as December 30, 1977. On June 30, 1977, after reversal of this Court's preliminary injunction, sixty-nine (69) promotions to the rank of Sergeant were made from the 1976 eligibility register. Excluding the nine (9) females promoted, the racial composition of the males promoted was equal, thirty (30) white males and thirty (30) black males. The last white male promoted was # 42 on the eligibility register while the last black male promoted was # 116. The process of selection was again made by use of a register coded with race and sex designations and, in effect, required the use of two eligibility registers for males.

Prior to the August 1, 1974, promotions, promotions to the rank of Sergeant had always been made in strict numerical rank according to the current eligibility register. No candidate was passed over or promoted on account of race as skin pigmentation was accorded no weight in the promotional process. Further, the evidence shows that all the white male officers who were passed over would have been promoted but for the color of their skin.

The Promotional Process

The notice of promotional examination dated November 1, 1973, stated that in order to be *promoted* to the rank of Sergeant it was a requirement that a candidate either have completed 12½ years of current service, commonly known as the grandfather clause, or have earned fifteen (15) quarter hours or ten (10) semester hours of college credit. However, in order to *sit* for the written examination all officers had to satisfy one of the following three eligibility requirements: (1) completion of three years service; (2) completion of 2½ years service and 2 years of college; or (3) completion of 2 years service and possess a four year college degree.

The promotional model for the 1973 process was comprised

of five weighted component parts. These parts and their respective weights were as follows: (1) Written Examination, 60%; (2) Performance Evaluation Ratings or Service Ratings, 30%; (3) Seniority, 8% maximum; (4) College Credit and (5) Veteran's Preference. The combined maximum for (4) (5) was 2%.

The Performance Evaluation rating score was determined by averaging the ratings attained by the candidate on his last two the first through 20th year of service and ⅛th of one through 24th year of service. College credit was computed on the basis of ½ of one percent per full year of college. Veteran's Preference was controlled by city ordinance.[7]

In 1974 the promotional model, as applied to the November, 1974 examination, was changed. The written examination weight was increased from 60% to 65%. Performance evaluation ratings were decreased from 30% to 15%. An oral board, or promotional evaluation board, was installed as a sixth factor and assigned a weight of 10%. Seniority was reduced to a maximum of 6% and computed on the basis of one percent per year for the first through fifth year of service and ½ of one percent for the sixth and seventh year. The college credit and veteran's preference components were increased to a maximum of 2% each, no longer 2% combined. Further, in order for a candidate, who did not qualify under the grandfather clause, to be promoted off the eligibility register he must have successfully completed 30 quarter or 20 semester hours of college, double the amount previously required.[8]

In 1976 the promotional model, including all component factors and weights, remained the same. However, in order to be *promoted* off the eligibility register the candidate must have completed 45 quarter or 30 semester hours of college credit if the candidate did not qualify under the requirements

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[7] Detroit, Michigan, City Code, Veteran's Preference, 385-F § 16-8-14.

[8] The requirements to *sit* for the written examination remained the same.

of the grandfather clause. Thus, greater emphasis was again placed on college education.

The Written Examination

A history of the promotional process shows that prior to 1969 intelligence quotient was accorded heavy emphasis in the written promotional examination.[9] In 1969, after serious evaluation of the written promotional examination, changes[10] began being instituted under the direction of Commander Richard Caretti to assure the elimination of any factor having a "disparate impact" upon minorities taking the examination.[11] While these changes were definite improvements, it was in the 1973-1976 period where the most extensive changes occurred.

The objective and charge of Caretti in preparing the 1973, 1974 and 1976 written examination was to eliminate any existing cultural or racial bias of former examinations by making the examinations as "content valid" as possible. Caretti was intent upon complying with existing federal testing guidelines and totally committed to eliminating old barriers, if any, which curbed the upward mobility of any racial or ethnic group.

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[9] There was, however, no evidence presented showing what impact, if any, these examinations had upon either black or white candidates for promotion. As Commander Caretti related, pass/fail rates by race were not recorded prior to 1973.

[10] For example. in 1970 the time in grade requirement to sit for the written exam was reduced to its present form in an attempt to increase the department's minority representation. The evidence shows that from 1961 to 1970 the time in grade requirement ranged from seven to two years depending on the college education of the candidate.

[11] Caretti was qualified as an expert in testing and personnel selection. He was responsible for the preparation of promotional exams given in 1969 and 1971. Additionally, Caretti has directed the preparation of every promotional exam for the rank of Sergeant from 1969 to the present date. His competency as the preparer of these examinations, or his qualification as an expert, has never been disputed by the defendants.

The first step toward this goal was made by attempting to define the current essential knowledge, skills or behaviors required for satisfactory performance in the position of Sergeant through job analyses prepared by Caretti and two outside experts.[12] Once the job analysis was completed for each promotional examination the actual examination questions were prepared. As with the job analyses, experts, inside and outside the department familiar with police personnel, were utilized in preparing specific sections of examination questions. The questions selected for use consisted of representative samples of the performance domain as defined by the job analysis and included aspects of performance which differentiated among levels of successful job performance. These questions pertained to major or critical work behaviors as this concept was a key focal point throughout the project.[13] The knowledge sought to be tested was not of a type which could be acquired in a brief orientation to the job. Terminology used in test questions was specifically chosen to reflect a job related vocabulary. Additionally, the conditions under the 1973-1976 examination were administered and scored were both controlled and standardized with safeguards instituted to protect the security of the testing and scoring process. Finally, Caretti attempted to achieve a staff racially composed of both whites and blacks in an effort to achieve input from both racial groups.

Caretti's efforts on the 1973-1976 examinations resulted in tests which measured relative differences of probable job success between candidates for promotion. All the evidence

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[12] John Furcon in 1973, Andres Inn in 1975.

[13] The critical work behaviors were fully described in the examination notices and contained sections on Supervision and Police Community Relations, Presentation of Evidence, Department Procedure including general orders, Leadership in special situations, Command requirements, Witnesses at crime scenes, Traffic laws, Liquor laws, City ordinances, Verbal skills, Training information bulletins, Criminal law, Criminal investigation, and Constitional limitations on search, seizure, arrest and evidence.

in the record demonstrates, and this Court finds as fact, that these examinations were in conformity with American Psycological Association Testing Standards and Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures. Dr. Wollack, a psychometrician, stated that after evaluating the process used by Caretti in preparing these promotional examinations he was of the opinion that they were fully job related and content valid.[14] Dr. Wollack also had the benefit of personally reviewing the actual 1973 and 1974 examinations to support his opinion. Additionally, he had prepared and studied an item analysis on the 1974 examination.[15] Dr. Wollack also concluded that there was no suitable alternative to the written examination which would have less adverse racial impact. Dr. Ebel, also a psychometrician, corroborated Dr. Wollack's findings and conclusions that the examinations were content valid. None of the plaintiffs' evidence regarding validity of the 1973-1976 written examinations has been challenged by the defendants. The Court accepts the testimony of Caretti, Wollack and Ebel and finds, as fact, that the 1973-1976 written examinations were professionally developed, tested areas which closely approximated the tasks to be performed on the job by the promotional candidates and were content valid in all respects.

Finally, the Court notes that the pass rate for the 1973, 1974 and 1976 written examinations for white males was 43%, 53% and 51%, respectively. Conversely, the pass rate for black males on the same examinations was 28%, 39% and 42%, respectively. Thus, matematically, the selection rate of black

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[14] Content validity can be loosely defined as tests whose content closely approximates tasks to be perfomed on the job by the candidate.

[15] The item analysis showed that, as a group, those persons on the 1974 eligibility register who were passed over and would have been promoted but for the passovers, scored better on 249 out of 366 questions than the group promoted out of order.

males vis a vis white males regarding the 1973-1976 written examinations was 65.1%, 73.2%, 82.4%, respectively.[16]

Performance Evaluation Ratings

Performance evaluation ratings, or service ratings, encompassed 20 factors of equal weight.[17] Each factor was scored on a range of one to five points with the maximum total of 100. All police officers were rated twice a year[18] by at least two, and preferably three, officers of superior rank. Additionally, in order to qualify as a rating officer the ranking officer should have supervised the candidate for a minimum of three months during the rating period. Separate evaluations were not made by each rater. Instead, the completion of the form represented the combined thinking of both raters. In order to guide and assist raters and to make the program meaningful, a set of guidelines on service ratings was published and made available to all raters. The guidelines counseled the rater to be objective and cautioned against bias and prejudice.

After each officer was rated he would be personally apprised of the evaluation by one of the raters and informed of any noted shortcomings so that a plan of corrective measures could be outlined and implemented. The rated officer was required to sign his service rating form after completion. If he wished to appeal his rating the officer had to make a written request within thirty (30) days of receipt of the rating citing the basis for his appeal. A two member service rating appeal board convened to hear the appeal. The hearing would be attended by the two rating superiors, the officer

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[16] Exhibits 198-200.

[17] Appearance, Cooperation, Enthusiasm, Flexibility, Good Judgment, Lack of Prejudice, Level of General Knowledge, Level of Specialized Knowledge, Maturity, Moral Courage, Motivation, Patience, Quality of Work, Quantity of Work, Reliability, Resourcefulness, Self-Improvement, Speaking Ability, Tact and Writing Ability.

[18] For a brief period of time bi-monthly ratings were installed, Exhibits 47 and 48.

submitting the appeal, and his commanding officer. At the conclusion of the hearing a complete report including recommendations would be prepared and forwarded to the Chief of Police for review. The report would then be reviewed and sent back for final disposition.

There was no minimum required score on service ratings in order to be eligible to sit for the written examination. As previously stated, service ratings were reduced from 30% in 1973 to its present 15% weight in 1974.

Caretti evaluated the service rating factor for the 1973 examination by dividing the eligibility register, and amendments, into two racial groups, black and white, and then dividing each group into four classes of seniority.[19] The analysis revealed that service ratings for both racial groups increased with the seniority of the candidates. Further, the study revealed that within the four classes of seniority blacks fared as well as their white counterparts.[20] The analysis showed that blacks with similar seniority tended to have slightly higher service ratings.

In the 1975 Equal Employment Opportunity Plan (EEOP) of the Detroit Police Department performance evaluation ratings are said to be an integral and necessary part of the promotional selection model.[21] Further, the plan reiterates the fact that service ratings have been carefully examined and its impact has been assessed. The plan states that the service rating factor does not have any systematically disparate impact on the promotional opportunities of minorities.

The Court finds, in accepting and relying upon these above facts, that service ratings, throughout the period of 1973 to the present date, have not been shown to have any disparate im-

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[19] The four classes were 3 years, 4-5 years, 6-10 years, and over 10 years.

[20] No study has been performed on the results of the 1974 or 1976 eligibility registers regarding service ratings.

[21] Caretti and Wollack corroborated this fact.

pact upon blacks or to discriminate against blacks in any manner in the promotional process.[22] Further, there is no evidence in the record showing discrimination against any group in the service rating factor prior to 1973.

Promotional Evaluation Board or Oral Board

In 1974 the Detroit Police Department inserted an oral board procedure into the promotional process and assigned it a weight of 10%. One of the key reasons for installation of the oral board was to reduce any potential adverse impact service ratings might have and to test candidates in areas not dealt with in other segments of the promotional model. Each board was composed of three officers above the rank of Sergeant from major police agencies around the country. These officers were selected on the basis of reputation in an effort to maintain objectivity in the process. All boards were required to consist of at least one black.

The evidence shows, and this Court finds as fact, that the oral boards were professionally developed and applied. Safeguards existed in the form of an extensive appeal procedure. Moreover, the evidence shows that as a group blacks scored

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[22] The Court finds it necessary at this point to note the clear error by the EEOC in its decision in *Baumgart, et al.* v. *Detroit Police Department, et al.*, Charge No. TDT5-0067, TDT6-1070, TDT6-1071 (exhibit 308). At page 14 of its decision, Table 7, the EEOC represents certain "Median service rating" of black and white candidates being in excess of 100, the highest possible score for a candidate's service rating. These figures are obviously erroneous and taint the intended analysis. Also, at page 11, the EEOC characterizes performance evaluation ratings as having a "systematically disparate effect on the promotional opportunities of minorities" relying upon certain statistical observations. In light of the evidence in this record, especially Caretti's analysis, the EEOC's analysis and conclusions are clearly erroneous. The Court is unaware of the particular evidence presented to the Commission on this factor but notes that its statistical analysis is particularly shallow. Accordingly, the Court places no weight on the EEOC decision regarding service ratings or their impact on black candidates for promotion.

somewhat higher on the oral boards than did their white counterparts. The department was very satisfied with the results of the oral board procedures.

Regarding the oral board component of the promotional process there has been little dispute as to whether the oral board discriminated against any racial group. The evidence shows, and this Court finds, as fact, that it did not.

Seniority

Prior to August, 1970 seniority was accorded a maximum of 10% in the promotional process. In August of that year it was reduced to a maximum of 8%. In 1974 seniority was again reduced to a maximum of 6%

The reason for the diminished emphasis on seniority as a factor in the promotional model was two-fold. First, it was felt that a reduction in the weighting of seniority would benefit minorities since, as a group, a majority had been on the force a short period of time and therefore had less seniority. Second, and more importantly, it was felt that seniority over seven years had diminished importance in terms of potential job success at the rank of Sergeant.[23]

Since 1968 all collective bargaining agreements negotiated between plaintiff, D.P.O.A., and the defendant, City of Detroit, have contained seniority provisions which grant seniority benefits to all employees regardless of race. The evidence clearly shows, and this Court finds as fact, that these provisions were the result of good faith arms length negotiations between the parties free from any intention to discriminate against any racial group.

No studies have been placed into evidence showing what impact seniority had upon black candidates for promotion vis a vis white candidates for promotion. However, the evidence does show that seniority equally affected blacks as well

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[23] See Exhibit 190, p. 63 and Caretti's testimony that "there is little difference between one year of seniority and one year twenty times."

as whites and that if this factor discriminated it did so against the younger, less senior officers without regard to their race. The Court finds not one scintilla of evidence to show intentional discrimination against either race regarding the insertion of seniority into the promotional process as a factor or regarding its insertion into the collective bargaining agreements between the parties.

Further supporting the Court's finding of non-discrimination in the seniority component is the EEOP of the Detroit Police Department. The department represented to the Law Enforcement Assistance Administration (LEAA) in submitting its plan that "the present formula that computes seniority to a maximum of six percentage points has no adverse effect on the promotional opportunities of minorities."[24]

Veteran's Preference

Veteran's preference was inserted as a component in the promotional model via Detroit City Ordinance.[25]

There has been no evidence presented to the Court showing that this facially neutral factor was racially discriminatory vis a vis black males or white males. No studies were presented to the Court showing what impact, disparate or otherwise, the veteran's preference factor has on either race. However, after examination of the 1973-1976 eligibility registers and their amendments the Court concludes that the veteran's preference factor discriminates against neither race.

College Credit

Since 1970 college education has been assigned a maximum of 2% in the promotional model computed on the basis of ½ of one percent per year. College credit was viewed by Caretti and the department as being job related because it heightened the officer's receptiveness to different points of

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[24] Exhibit 190, p. 64.

[25] Detroit City Code, § 16-8-14, Veteran's Preference.

view. Viewing education as such, officers, both black and white, had available both city and federal funds via the department if they sought a college education.

No evidence has been presented to the Court, either statistical or testimonial, showing racial discrimination in the inclusion or application of this component. Thus, the Court finds the facially neutral educational factor to be non-discriminatory.

The Entire Promotional Model

It is important to note that the Detroit Police Department has no written validation report regarding the 1973-1976 examinations or the promotional models. However, equally important to note is the fact that Caretti, Wollack, Guenther and Ebel consistently testified that the promotional models for 1973-1976, including each component part, were job related and content valid. The testimony consistently was, and this Court finds to be fact, that the higher a candidate stood on the eligibility register the better qualified and equipped he was to assume the position of Sergeant. The above mentioned witnesses testified, and the Court accepts as fact, that application of the model was intended to, and in fact did, demonstrate relative differences in potential job performance. Further, these witnesses testified, and this Court accepts as fact, that the candidates positioned on the register were not, as defendants claimed, equally qualified or a "pool" of qualified candidates.[26]

The Affirmative Action Plan of the Detroit Police Department

Between late 1973 and mid-1974, Police Chief Philip Tan-

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[26] Defendants presented the Court with no evidence, other than bald assertions by Tannian, to support the claim that these candidates were "equally qualified".

nian[27], as a result of conversations with City of Detroit Mayor-Elect Coleman Young and their joint belief that the Detroit Police Department should be racially reflective of the population of the City of Detroit, committed themselves to the adoption of an affirmative action plan designed to meet this racial balance objective.

On July 1, 1974, the City of Detroit adopted a new City Charter requiring, *inter alia*, the Mayor to appoint a Board of Police Commissioners, hereinafter referred to as BPC. The appointment of the BPC constituted a major change in the structure of the police department as promotions within the department now had to be approved by the BPC after recommendations by the Chief of Police.

The first BPC meeting convened on July 22, 1974. The principal purpose of the meeting was to discuss the adoption of an affirmative action program for the police department. Chief Tannian conducted a presentation before the BPC citing reasons for recommending an affirmative action plan. The foremost reason given by the Chief was alleged prior discrimination against blacks by the department. To support his emphatic claim of historical discrimination regarding the hiring of blacks Tannian cited the work force/general population disparity with regard to blacks on the police force. These statistics, which the Court accepts as correct, showed that blacks comprised only 17% of the total work force of the department while the population of the City of Detroit was 44% black.[28] Tannian also cited performance evaluation ratings and seniority as impediments to minorities in the promotional process.[29] Finally, Tannian cited *Schaefer* v. *Tannian*,

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[27] Philip Tannian, originally appointed Police Commissioner under former Mayor Roman Gribbs was reappointed Police Chief by Coleman Young. Young assumed the office of Mayor of the City of Detroit, in January, 1974.

[28] 1970 Census.

[29] Statistics reveal that 5% of all Sergeants in 1974 were black. (61/1185).

394 F.Supp. 1128 (E.D.Mich.1974), a suit involving sex discrimination in the Detroit Police Department which, in part, established limited preferential hiring.

As part of the presentation Tannian provided the BPC with a prepared affirmative action resolution declaring that "de facto discrimination" exists in the hiring and promotion of blacks and other minorities in the Detroit Police Department.[30] The resolution further stated that because of past and present discrimination the Chief of Police is required to take immediate affirmative action to eliminate such discrimination by promoting "minorities" from existing promotional lists. The resolution was not acted upon by the BPC but was instead placed on the agenda of the next meeting.

The BPC reconvened on July 31, 1974. The affirmative action resolution, as provided by Tannian, was read and after the BPC closed a floor discussion[31] the members unanimously adopted the Tannian affirmative action resolution. At this time Tannian requested, and received, approval from the BPC authorizing the first set of out of order promotions from the current Sergeants eligibility register.[32] Tannian cited the affirmative action resolution of the BPC as sufficient reason for the out of order promotions in an attempt to comply with the City Charter.[33] No white males were pro-

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[30] The wording "defacto discrimination" apparently was extracted from a legal memorandum submitted by Special Assistant Corporation Counsel for the City and relied upon by Tannian prior to his presentation to the BPC. (exhibit 215).

[31] The EEOC in *Baumgart, supra* characterizes this spontaneous discussion as "testimony" in an effort to dignify the same. This is clearly erroneous. The utterances were neither under oath nor investigated by the BPC and were, at best, rank unsubstantiated hearsay.

[32] Effective August 1, 1974.

[33] The City Charter, § 7–1114, provided that no person eligible for promotion shall be passed over unless the Chief of Police files written reasons acceptable to the BPC. This Court finds, however, that at no time did Tannian file such written reasons to the BPC satisfying this charter requirement.

moted[34] out of the thirty (30) selected for promotion because the prior thirty (30) promotions had been, with the exception of one, all white. Aware of Mayor Young's campaign promises to racially balance all levels of City government[35] this 50/50 black-white ratio was selected by Tannian because of its correspondence to the present 50/50 black-white ratio of the population of the City of Detroit. From this date to the present all male promotions to the rank of Sergeant were typified by this 50/50 quota.

As stated previously, the BPC relied heavily upon Tannian's work force/general population statistics to show "de facto discrimination" against blacks as reason for adoption of the affirmative action plan. However, the facts in evidence show that no labor market[36] statistics or analysis were presented to the BPC.

The purpose of a labor market analysis, as this Court understands it, is to identify problem areas in terms of underutilization of specific groups or classes. In performing a labor market analysis the first step is to determine the geographical area from which an employer draws it work force, i. e. recruits. Next, the number or percentage of persons in a particular subgroup in the geographical area possessing the minimum requirements for employment is determined.[37] The final step requires a comparison between this figure and the

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[34] Knowledge of the race and sex of the officers recommended for promotion was achieved by use of a coded eligibility register prepared by Caretti pursuant to Tannian's request.

[35] Tannian testified that the Mayor had expressed dissatisfaction with the first 30 promotions because they didn't reflect fulfillment of campaign promises to racially balance all levels of City government.

[36] Labor market is generally defined as a subset of the civilian work force as defined by certain geographical boundaries. Civilian work force is a sub-set of the general population, age 16 and above, and includes those currently employed and those looking for employment. Work force is defined as those persons working for an employer.

[37] This becomes the relevant labor market.

number or percentage of employees in the subgroup employed by the employer.

The evidence in the record reveals, and this Court finds as fact, that since 1968 to the present date, recruiting efforts for applicants to the Detroit Police Department covered a geographical area inclusive of the entire State of Michigan. However, the bulk of all applicants, both black and white, were found in a tri-county area of which the City of Detroit is a part.[38] Until August of 1974 there was no pre-application residency requirement by the City. Prior to that time an applicant need only have been a resident of the State of Michigan for one year.[39] The experts have testified, and this Court accepts such testimony as fact, that the proper labor market for comparison in this case is the tri-county area, commonly known as the 1970 Standard Metropolitan Statistical Area (SMSA).[40] The relevant labor market is not the general population of the City of Detroit.[41]

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[38] The tri-county area is Wayne, Oakland and Macomb counties. The City of Detroit is located in Wayne County.

[39] In August of 1974 the department adopted a pre-application residency requirement. In order to qualify for consideration subsequent to this date the applicant had to be a resident of Detroit for a minimum of 60 days. After August 1974 the relevant labor market, without knowing whether the applicant changed residence for the purpose of applying, would be the City of Detroit. The residency requirement was enacted because large numbers of white applicants resided outside the City of Detroit. See exhibit 190, pgs. 31-33.

[40] The tri-county area, SMSA, was expended by the Bureau of Census in 1973 to include St. Clair, Lapeer and Livingston counties. The Court, however, rejects the expanded SMSA as being too remote and confines its analysis to the original SMSA as defined.

[41] General population statistics are inappropriate because they include persons who are not part of the applicable civilian work force, e.g., those below sixteen and those over sixty-five, those not seeking employment and those employed. Further, they are inappropriate because they include persons who have no attachment to the particular labor market, that is, those persons not meeting the minimum requirements for the job.

Using the 1970 census and the SMSA as the proper geographical area, application of the second step[42] shows that 18.6% of the relevant labor market was black. This figure, when compared to the 17.23% of blacks on the department in 1974, reveals that blacks were slightly underutilized but not to the degree represented by Tannian and exclaimed by the BPC in the affirmative action resolution as decisive.[43]

Regarding the second factor relied upon by Tannian and accepted by the BPC in adopting the affirmative action resolution, to wit, performance evaluation ratings and seniority, the evidence in this record demonstrates, as this Court has previously found, that neither of these component parts of the promotional process curtailed the promotional opportunity of blacks or in any way discriminated against them. This conclusion could have, indeed should have, been reached by the BPC had Tannian revealed certain facts he conveniently failed to communicate to the BPC or if the BPC had investigated the truth of the assertions as was their duty. The BPC was not made aware that (1) Caretti's study on service ratings revealed that blacks were not disadvantaged by this component part; (2) Service Ratings were to be reduced in weight in the 1974 model from 30% to 15%; (3) Seniority had been fairly negotiated for and inserted as a contractual provision in collective bargaining agreements since 1968; and (4) Seniority was to be reduced in weight in the 1974 model from 8% to 6%. The most significant failure to fully represent the effect of seniority or service ratings was

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[42] The number of blacks, including those missed by certain enumerators, within the civilian labor force of the SMSA who met the age and education requirements of the department. Census figures contain insufficient data to determine whether potential applicants satisfied other application requirements, such as height, weight, vision, criminal record and driving record. *See* Rosenblum testimony on 12/7/77.

[43] Nor to the degree as proclaimed by the EEOC in *Baumgart, supra.* While proper statistical comparisons are a useful means of evaluating the overall effect of an employer's policies, improper comparisons such as relied upon the EEOC are irrelevant.

made by Tannian's failure to produce Caretti before the BPC or at a minimum consult with him regarding these elements prior to the presentation to the BPC.[44] Caretti was, and is, the preparer of the model and each component part and his informed opinion was necessary for a complete and fair analysis of these factors.

Accordingly, the Court finds that service ratings and seniority did not impinge the promotional opportunities as represented by Tannian to the BPC. Further, the Court finds that Tannian neglected to paint the full picture in his presentations to the board regarding these factors and that the BPC failed to fulfill their duty to investigate the factual matters as presented by Tannian.

Schaefer v. *Tannian, supra,* was also given as a pivotal reason requiring an affirmative action plan. While the *Schaefer* case legally speaks for itself, the facts of *Schaefer* did not do so in the BPC meetings. In essence, Tannian represented that inasmuch as the department had been found guilty of discrimination against women the same would inevitably hold true for blacks and other minorities. Thus, if sued by blacks the Court would order preferential hiring and promotions. While such logic, from a legal standpoint, is badly flawed a reading of the *Schaefer* case shows that the seminal facts in that case simply did not apply to the action under consideration by the BPC.[45] This Court finds that Tannian, a lawyer and party to the *Schaefer* action, inten-

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[44] Additionally, Tannian failed to communicate to the BPC at subsequent meetings certain facts in the Equal Employment Opportunity Plan which the department submitted to the Law Enforcement Assistance Administration. Specifically, the plan represented that neither of these component parts had an adverse effect upon minorities.

[45] Among these facts are: (1) discrimination against women applicants was based upon the fact that women were required to have greater education than men; (2) written examinations were given more frequently for men than women; (3) the relief was directed solely to hiring; and (4) the preferential hiring was limited to a single eligibility register.

tionally misrepresented the significance of the decision to the BPC.

Three additional considerations have been relied upon by defendants in either adopting the affirmative action plan or in defense at trial. First, historical discrimination in the Detroit Police Department in hiring and promotion. Second, funding requirements of the Law Enforcement Assistance Administration. Third, the operational needs of the department required employment and promotion of greater number of blacks.

Addressing the factual correctness of the first claim, the evidence in the record shows that since 1968, the point in time when Caretti arrived at personnel, the department has taken many steps to advance black recruitment efforts.[46] The department formed a steering committee on minority recruitment with particular emphasis towards recruitment of black applicants. It designed an "outreach program" relying principally on various advertising techniques to attract qualified black applicants. As part of this program the department sent recruiting vans into areas highly populated by blacks. It initiated several new themes aimed at convincing black men and women that police service provides an excellent opportunity to make meaningful contributions to the community. The department advertised through minority based newspapers and radio stations in an effort to attract greater numbers of blacks. Recruiting posters depicting minority officers were circulated. An officer referral program, primarily directed toward minority officers, was installed in an effort to recruit qualified black applicants. Recruiting efforts were also made at colleges throughout the state with a primary focus on attracting blacks.[47]

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[46] This concerted effort was sparked by the July, 1967 Detroit riots.

[47] These coleges included Michigan State University, Eastern Michigan University, University of Michigan, Oakland County Community College, Oakland University, Wayne State University and Shaw College. It should be noted that this fact reinforces the finding that the SMSA was the proper labor market.

In 1971 the department hired a black director of police recruiting. Further, in 1974, the department solicited the support of Mayor Young who responded proclaiming February of 1974 "Minority Recruitment Month" and issued a press release calling upon young minority men and women to give serious consideration to careers in the Detroit Police Department in an attempt to make the department a true reflection of the makeup of the community. A local television station aired two documentaries on the department's minority recruitment efforts. Eventually 85-90% of all field recruiters were black. Additionally, more than 50% of the supervisors and background investigators were members of minority groups.

The site of the recruiting section was changed from the headquarters building to several inner-city buildings in predominantly black neighborhoods. Processing procedures, formerly lengthy, were shortened in response to the loss of minorities caused by a loss of motivation. A law enforcement program was instituted in Detroit Public High Schools to attract and prepare blacks for entry into the police profession. Finally, minorities who had previously applied to the department and been rejected were contacted to reapply.

These efforts demonstrate, and this Court finds as fact, that from 1968 to the present date, the department has made every possible effort to attract qualified black applicants for employment in the Detroit Police Department. Indeed, the efforts of the department demonstrate that the department is, to use its own words, the "nation's forerunner in this area."[48]

Defendants presented the BPC and this Court with statistics regarding the number of blacks hired by the police department from 1944 to 1975 which, it is argued, prove past racial discrimination against blacks. After careful review of these statistics[49] the Court finds that these figures do not

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[48] Equal Employment Opportunity Plan, Exhibit 190, p. 17.

[49] Exhibits 201, 208, 268, 269.

show such discrimination. In reaching this finding the Court has found that although the statistics show that from 1944 to 1968 the number of whites appointed far outdistanced the number of blacks appointed there is no evidence in the record regarding the number of applicants from each racial group during this period of time. Nor is there evidence showing what the relevant labor market was during this period of time and the number or percentage of qualified blacks in this market. Without this information the naked numbers of black and white hired is susceptible to a multitude of conclusions.

Further, while the statistics do show a significant difference between the number of black and white applicants and the number of black and white appointees from 1968 to 1975, the data base upon which these figures were derived reveals a multitude of errors in the reporting process seriously impairing any responsible analysis. These applicant flow records are confusing and, in many areas, incomprehensible.[50] Such deficiencies have totally obliterated any statistical verity to be accorded them regarding the percentages of black and white applicants ultimately appointed from 1968 to 1975[51] and are therefore entitled to, and receive, no weight by this Court.[52]

Much testimony has been adduced regarding the entry level written examination as bearing upon the question of prior discrimination against blacks in hiring. This testimony shows, and the Court so finds, that prior to the 1968 exams,

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[50] Indeed, Commander Thomas Ferrebee, head of recruiting since 1971, testified that he could not explain why sets of numbers that should balance did not. He agreed that he did not understand the reports.

[51] See Testimony of March Rosenblum 12/7/77.

[52] The EEOC in *Baumgart, supra* relied upon these hiring statistics, as did Tannian and the BPC, in its finding of prior discrimination in the hiring process. In view of the above mentioned shortcomings inherent in the department's statistics the EEOC's analysis suffers from the same illness as the Tannian analysis and likewise will receive no weight by the Court.

the entrance tests were three to three and one half hours in length and were primarily intelligence quotient oriented. The examinations tended to fail large numbers of blacks in relation to their white counterparts. In 1968, on recommendation of the Vickery Committee,[53] the examination was changed to a 12 minute Wonderlic Examination on the premise that this examination would be an improvement for minorities in terms of length of time required by the exam. In practice, the exam continued to pass a high percentage of whites while failing a high percentage of blacks. The Vickery Committee expressed its dissatisfaction and sought out a better examination. Their objective was to find an entry level examination which would be a reasonable predictor of potential job success, free from cultural bias suspected in the present exam. Additionally, the committee desired an exam which would produce equal racial representation on the police force.

In early 1971 the Vickery Committee contracted and hired John Furcon of the University of Chicago to prepare an entry level examination meeting these objectives. Furcon began preparing an entry level examination and in March of 1971 provided the department with an interim test for use until his work was complete. The interim test, known as the "Chicago battery," tested Detroit applicants on the basis of an alleged validated Chicago Police Department entry examination. The exam set different passing scores for black and white Detroit applicants based upon the average passing scores for their Chicago counterparts. These tests were basically I.Q. exams[54] and, while improving the percent of

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[53] The Vickery Committee was born in the wake of the 1967 Detroit Riot on recommendations of the Mayor and New Detroit, Inc. Larry Vickery, chairman, was charged with determining why minorities were not succeeding in the application process of the Detroit Police Department.

[54] A combination of Wonderlic and Otis exams occasionally augmented by a pictorial reasoning test.

black applicants passing the examination, continued to screen out greater numbers of blacks than whites. The Chicago battery was continued in use until 1973 when the Detroit Furcon exams were completed.

The Detroit Furcon Exams were scored by use of differential regression equations. Use of differential regression equations rests upon the assumption that the use of either differing tests or the application of varying weights to the same questions can measure one standard of job performance. With the advent of the Detroit Furcon examinations black and white applicants passed at approximately the same rate.

The defendants claimed at trial, as well as representing to the LEAA in their Equal Employment Opportunity Plan, that the Furcon exam for Detroit had been validated. However, at trial neither Furcon nor a validation report was produced. Contrary to this assertion of validity, the expert testimony in the record shows, and this Court finds as fact, that the Furcon examination was not a job related exam and resulted in random hiring as opposed to hiring the most qualified.[55] No contrary evidence was presented regarding this finding. Accordingly, the Court finds from the foregoing facts that the department's primary concern was not in attempting to determine who were the best suited for employment with the department. Rather, the concern was to racially have the police department reflect the composition of the population of the City of Detroit.[56]

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[55] The experts agreed that because the entry exams were not job related, deficiencies in a group's performance on the promotional exams may well be explained by the randomness of the entrance exams. In other words, the job related promotional exam reveals potential for upward mobility while the entry exam did not.

[56] Supportive of this fact is Ferrebee's testimony that in effect there are three eligibility entry registers: white male, black male and female. The manner of selection, excluding females, consists of selecting all eligible black males and, if there are insufficient applicants to fill existing openings, fill the remainder with white males.

The final form of hiring discrimination evidence was received from individual black police officers regarding their prior departmental experiences.[57] A review of their entire testimony shows that all but one of those applicants were rejected, if at all, for proper non-racial reasons. The one exception is Rodney Brown. Brown originally applied in 1963 and was rejected on the basis of being too short.[58] The minimum height requirement at that time was 5'8½" and Brown stood 5'11". This fact shows an improper rejection but in and of itself does not show racial discrimination. There is no testimony showing that the rejection was anything but a wrongful one. It has not been shown that the person measuring Mr. Brown was white. Nor has it been shown that white males, shorter than 5'8½" were accepted either before or after Mr. Brown's rejection. One isolated incident occurring 15 years ago does not demonstrate that there was a practice of improperly rejecting blacks on the basis of the height requirement. The Court cannot find that Mr. Brown was rejected because of his race but can only find the rejection to have been improper.

Defendants have also claimed that discrimination against blacks existed in the department's past promotional practices.[59] No evidence has been produced regarding promotional models antedating 1973. If evidence of racial discrimination, either overt or covert, existed in these models it should have been produced by the defendants. In view of the fact that it was not, the Court can only conclude, as fact, that prior promotional models and their application

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[57] Moses Baldwin, Jessie Stewart, Clifton Donaldson, Maurice Cochran, Bruce Ford, Rodney Brown and Ralph Wallace.

[58] Mr. Brown subsequently applied to the Detroit Police Department in 1972 and was thereafter appointed in August of that year.

[59] The 1973-1976 promotional models have been discussed by the Court previously and have been found to be content valid, free of cultural bias and and (*sic*) racial discrimination.

were not discriminatory against blacks, whites or any other class of individuals.

In summation, the evidence reveals, and this Court finds as fact, that until 1973 entry level (hiring) written examinations of the Detroit Police Department may have constituted a source of discrimination against blacks seeking entry into the department because these examinations were heavily weighted on I.Q. type questions, were not job related and tended to fail large numbers of blacks vis a vis whites. However, the evidence also shows that after installation of the Detroit Furcon exams in 1973, no discrimination of any form existed in regard to black applicants for positions as police officers.[60] Further, this Court finds that the application of promotional models existing prior to 1973 did not discriminate in any fashion against black police officers.

In defense of its affirmative action plan the defendants have claimed that the Detroit Police Department was required to adopt such a plan or risk the threat of loss of federal funds from the Law Enforcement Assistance Administration (LEAA).[61] The evidence in the record reveals, and this Court finds as fact, that in 1974 the LEAA conducted audits of the department's employment practices. Upon conclusion of the audits the LEAA required the department to submit a written program merely documenting their current practices in order to continue receipt of grants. The department, however, had never received any complaints from the LEAA that its pre-affirmative action hiring or promotional policies or practices were discriminatory against any group. Nor had the department ever been threatened with a revocation of funds for lack of an affirmative action plan. Funds were threatened to be cut off, if at all, for the sole reason

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[60] At this point in time blacks and whites were passing the entry examinations at approximately the same rate.

[61] The Detroit Police Department has, both before and after the adoption of the affirmative action plan, received grants from the LEAA which were used, in part, to pay salaries of police officers and Sergeants.

of failing to submit a written program documenting the department's current employment practices. The deadline for filing was December 31, 1975.

In July of 1975 Tannian directed Jacqueline DeYoung to prepare the required plan.[62] Ms. DeYoung familiarized herself with a Equal Employment Opportunity Program Development Manual prior to preparation of the plan and attempted to comply with the manual's directives.

The plan as submitted on December 31, 1975 was approved by the LEAA in 1976. The EEOP submitted by the department makes many statistical comparisons between the work force of the department and the general population of the City of Detroit.[63] Tannian directed DeYoung to use general population statistics despite her insistence that such comparisons were improper.

While the department's EEOP represented that the Detroit Police Department provides equal employment opportunity for all employees it concealed much of what was the actual present practice of the department regarding promotions to the rank of Sergeant. The plan represented that "adjustments" from the eligibility register were necessitated in order to facilitate the attainment of affirmative action objectives and that promotions to the rank of Sergeant have been made "in a manner that assures that appropriate proportions of minorities and female officers are selected."[64] The plan, however, does not inform the LEAA that the "adjustments" and "manner" referred to are actually made by intentionally passing over white males who have achieved a higher position under a content valid promotional model in order that equal number of black males may be promoted. The plan does not inform the LEAA that "appropriate pro-

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[62] DeYoung was employed with the department and participated in the audits conducted by LEAA.

[63] The statistics were the same comparisons as those submitted by Tannian to the BPC in 1974.

[64] Exhibit 190, pgs. 7-8.

portions" means that of a 50% quota. The most incredible misrepresentation of the plan is its consistent use of the word "minorities". The affirmative action plan of the department did not apply to the broad spectrum of minorities. It applied to blacks and blacks alone. The department did not reveal that it deemed American Indians, Chinese, Japanese, Mexican, Spanish, Latinos, Whites and all other racial and ethnic groups to constitute the majority. Also omitted from the EEOP is the fact that the department had instituted an appeal procedure, as of right, for those officers passed over for promotion under the guise of the affirmative action plan. The reason for the omission is obvious. The evidence shows that in order to appeal an officer had to state facts sufficient to prove the following. First, that the appealing officer was on the eligibility register and an officer in a lower position was promoted. Second, the action was not based on the affirmative action policy as adopted by the BPC. Thus, inasmuch as the evidence clearly shows that no officer was passed over for a reason *other than* the affirmative action plan, the so-called "right of appeal" was non-existent. The evidence shows that all appeals were perfunctorily denied because the appealing officers could not allege the jurisdictional facts required to perfect an appeal. Not only did the required jurisdictional facts render the appeal a nullity, they constituted a violation of the City Charter which granted a right of appeal.[65] Omission of the appeal process from the written EEOP is quite understandable in view of these facts since upon revelation it would have exposed the actual promotion system thereby self-indicting the appeal process.

In conclusion, this Court finds that the department did not institute the affirmative action plan because of a threat of loss of federal funds flowing from the LEAA. On the contrary, once the LEAA required a written plan the department attempted to mask and conceal from the LEAA actual departmental practices with regard to promotions.

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[65] Detroit City Charter, § 7–1114.

As a final consideration in defense of the affirmative action plan the defendants stand upon the amorphous claim of "operational needs". Stripped to its barest form this argument rests upon the premise that blacks can communicate and cooperate better with blacks than can whites. Thus, since the City of Detroit is largely black greater numbers of blacks in all ranks of the police force will tend to enhance communication and cooperation with the community, install greater respect for the department, reduce and solve crime, and in general, improve the overall effectiveness of the department.

As proof of the foregoing belief defendants rely principally upon an alleged reduction of crime and a drop in citizen complaints. On the whole, the evidence in the record reveals, and this Court finds to be fact, that neither the quantity of crime nor the number of citizen complaints dropped with the advent of the department's affirmative action plan. More importantly, however, is the fact that there is no evidence in the record indicating that if such a decrease in crime and citizen complaints did exist that the decreases were attributable to the affirmative action plan.

Diametrically opposed to the void of competent evidence concerning the claim that the affirmative action plan improved the overall effectiveness of the department is evidence,[66] which the Court accepts as fact, that the inclusion of race as a promotional criterion damages departmental morale and the quality of work of all officers. The record evidence demonstrates, which the Court accepts as fact, that a police officer's effectiveness, as a professional law enforcement officer both within the department and the community in which he serves, is dependent upon his education, skill, training, attitude and sense of professionalism. The unalterable pigmentation of his skin has no bearing upon these facts and neither enhances nor depreciates his professional en-

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[66] Testimony of Dr. Ebel, Dr. Wollack and Dr. Beckman.

forcement effectiveness. Defendants' claim that operational needs of the department required more blacks on the police force is rejected by the Court as being factually unsupported by any competent evidence.

CONCLUSIONS OF LAW[67]

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[67] In assembling the Findings of Fact and Conclusions of Law the Court has placed no weight on the EEOC determination of no reasonable cause in this case. *Baumgart, et al.* v. *Detroit Police Department, et al.*, Charge No. TDT5-0067, TDT6-1070, TDT6-1071, 12/8/77. The reasons for this evaluation is two-fold. First, the pivotal facts as revealed by the EEOC investigation are contrary to the evidence in the record as shown by the Court's Findings of Fact. Specifically, the EEOC erroneously states that: (1) the "relevant background facts are not in dispute" (p. 2); (2) "All forty-one (41) candidates were white males" (p. 2); (3) "The all-white selection for supervisory positions was typical of the racial pattern of past selections" (p. 2); (4) "Testimony was taken at public hearings" (p. 3); (5) only "the top 100 slots actually had a reasonable expectation of being promoted" (p. 12); (6) the defendants' numerical promotion ratio is "temporary" and justified by the use of "unvalidated promotional tests" (p. 16); (7) the eligibility registers were "unlawfully derived" (p. 16); (8) the "selection process did not necessarily identify the most qualified candidates for promotion" (p. 20); and (9) the officers on the eligibility register represent a "pool" of highly qualified candidates (p. 20). All these statements find not a scintilla of supporting evidence in the record and are clearly erroneous.

The second reason requiring the Court to ignore the EEOC determination is its interprtation of employment discrimination law. Specifically, "a reasonable belief that discrimination has occurred" (pgs. 5-6) will not justify a quota. 42 U.S.C. § 2000e-5(e). The proper role of statistics does not lie in the comparison between the employer's workforce and general population. (Pgs. 6-7) *Hazelwood, infra.* A legitimate seniority system is not unlawful simply because it may perpetuate pre-Act discrimination. (p. 11) *Teamsters, infra.*

A shoddy background investigation can explain gross factual errors but does not provide a reason for the selective reading of legal authorities. On the final day of a four month trial, after this charge had been with the EEOC for over forty months, the EEOC's decision is produced and proffered as an exhibit. Over plaintiffs' vehement objection on grounds of unfair surprise, the Court accepted it. The Court should have refused its admission, not on grounds of prejudice, but on grounds of relevance. The decision is probative of nothing – except the fact that the Commission is fond of utilizing the courts to establish theories which have been previously rejected by the United States Supreme Court.

Title VII[68]

The complainant in any Title VII action, 42 U.S.C. § 2000e, *et seq.*, must, at the outset, carry the initial burden under the statute of establishing a prima facie case of racial discrimination. As the United States Supreme Court stated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973):

> "This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[13]" (footnote omitted)

Subsequent to the *McDonnell Douglas* decision the Supreme Court unequivocally dispelled the notion that Title VII only applied to non-whites holding that Title VII prohibits racial discrimination against whites in the same fashion as it prohibits racial discrimination against any protected group.[69] *McDonald* v. *Sante Fe Trail Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976); *Haber* v. *Klassen*, 540 F.2d 220 (6th Cir. 1976); *Herrman* v. *Coleman*, 428 F.Supp. 447 (D.C.D.C.1977).

Inasmuch as the *McDonnell Douglas* decision involved a refusal to hire and the instant case centers around a refusal to promote, the prima facie proof required, although similar, is somewhat differing. A prima facie case of failing to pro-

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[68] The plaintiffs have exhausted their administrative remedies as required by 42 U.S.C. § 2000e-5(b)-(f). *McDonnell, Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Allen* v. *Amalgamated Transit Union Local 778*, 554 F.2d 876 (8th Cir. 1977). The Court, therefore, has jurisdiction to determine the Title VII claims of plaintiffs.

[69] The same conclusion was reached by the Court in interpreting 42 U.S.C. § 1981.

mote because of racial discrimination is made by showing (i) that plaintiffs belong to a protected class or group; (ii) that they were qualified for promotion and might have reasonably expected selection for promotions under the defendant's on-going competitive promotion system; (iii) that they were not promoted; and (iv) the supervisory level employees having responsibility to exercise judgment under the promotion system betrayed in other matters a predisposition towards discrimination against the members of the protected group. *Pettit* v. *United States,* 488 F.2d 1026, 1033, 203 Ct.Cl. 207 (1973); *Thompson* v. *McDonnell Douglas Corp.,* 416 F.Supp. 972, 980 (E.D.Mo.1976).

Additionally, the class action plaintiffs ultimately had to prove more than the mere occurrence of isolated, accidental or sporadic discriminatory acts because they have alleged a pattern or practice of racial discrimination in the area of promotions contrary to Title VII. Plaintiffs had to establish by a preponderance of the evidence that racial discrimination was the defendants' standard operating procedure—the regular rather than the unusual practice. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 336, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 772, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976).

The Court's Finding of Fact unequivocally establish that both plaintiffs have proven the four elements of a prima facie case of racial discrimination regarding the defendants' usual practice of promotions to the rank of Sergeant. The plaintiffs are members of a protected class. *McDonald* v. *Sante Fe Trail Transportation Co., supra; Haber* v. *Klassen, supra.* They were better qualified than those officers promoted who stood lower on the eligibility register and but for the defendants' affirmative action plan would have been promoted. They were not timely promoted. Finally, defendants' operation of the affirmative action plan evinced a predisposition towards discrimination against whites.

The burden may be deemed shifted to defendants to articu-

late, as to each passover of plaintiffs, where they might have been selected, that the non-selections were for legitimate non-discriminatory reasons. *McDonnell Douglas Corp.* v. *Green, supra.*

In enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, Congress did not intend to guarantee a job or promotion to every person regardless of qualifications. The Act does not command that any person be hired or promoted simply because he was formerly the subject of discrimination. Discriminatory preference for any group is precisely and only what Congress has proscribed. Thus, Congress has required employers to remove artificial, arbitrary and unnecessary barriers to employment when such barriers operate to discriminate on the basis of race or other impermissible classification. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *McDonnell Douglas Corp.* v. *Green, supra; McDonald* v. *Sante Fe Trail Transportation Co., supra.*

Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a) specifically provides:

> "Section 703(a); It shall be an unlawful employment practice for an employer—
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> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."

It is clear from the evidence in the record, as found by the Court's Findings of Fact, that defendants have, since

August of 1974, continually and repeatedly violated Section 703(a) by granting preferential treatment to blacks on the sole basis of their race thereby discriminating against all others.

In an attempt to avoid the express prohibition of Section 703(a) defendants seek to justify the racially discriminatory effects of their quota system by relying upon the desire to racially balance the police department with the population mix of the City of Detroit.

Section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), provides, in pertinent part, as follows:

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by an employer, . . . in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Notwithstanding the clear prohibition of the statute, a review of the legislative history of the Civil Rights Act of 1964 demonstrates that Congress was totally aware of affirmative action programs when it enacted Section 703(j) and consistently expressed the intention that any deliberate attempt to maintain racial balance by consideration of an employee's race would violate Sections 703(a) and 703(j). By enacting Section 703(j) Congress recognized, and rejected, the notion that racial groups were entitled to proportional representation in all occupations. Simply put, Section 703(j) requires rejection of defendants' contention that racial balancing is a legitimate non-discriminatory reason for the non-selection of the white police officers. *Weber* v. *Kaiser Aluminum & Chem-*

ical Corp., 563 F.2d 216 (5th Cir. 1977); *Cramer* v. *Virginia Commonwealth University*, 415 F.Supp. 673, 678-679 (E.D.Va. 1976).

Defendants further seek to justify the affirmative action plan designed to racially balance the police force on the ground that "operational needs" of the department required greater numbers of blacks. Notwithstanding the fact that the Court has found no factual basis for this belief, Title VII would clearly render such a defense void as a matter of law. Specifically, Section 703(e), 42 U.S.C. § 2000e-2(e), provides in pertinent part as follows:

> "Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ."

Noticeably absent from Section 703(e) is the inclusion of race or color as bona fide occupational qualifications. After careful review and consideration of the legislative history of this section the Court must conclude that the omission of race and color as bona fide occupational qualifications was an intentional one and that Congress did not view race as a qualification which could, in the proper factual context, be considered reasonably necessary to the normal operation of any business or enterprise. The legislature has, by the terms of Section 703(e), sanctioned a limited customer preference exception in the areas of religion, sex and national origin but has refused to do so in the areas of race or color. *Diaz* v. *Pan Am World Airways, Inc.*, 311 F.Supp. 559, 569 (S.D.Fla.1970), *rev'd on other grounds*, 442 F.2d 385 (5 Cir.) *cert. denied*, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971); *Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977).

Prior racial discrimination in hiring and promotion has been the crux of the defense of the affirmative action plan of the Detroit Police Department. During the course of trial defendants' presentation of proof of such discrimination was largely, if not totally, statistical. Although the Court in its Findings of Fact rejected the majority of the hiring statistical evidence for the factual reasons stated therein, there are a number of legal principles further requiring the rejection of defendants' statistics which, it is argued, constitute past legal discrimination against blacks in violation of Title VII.[70]

No doubt can exist that in employment discrimination cases the Supreme Court has sanctioned the use of statistics by a plaintiff in order to establish a prima facie case of racial discrimination. *Griggs* v. *Duke Power Co., supra; Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *International Brotherhood of Teamsters* v. *United States, supra; Hazelwood School District* v. *United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). The logic behind such an allowance is based upon acceptance of the fact that in many cases individual employees are incapable of compiling concrete evidence of specific acts of discrimination or discriminatory employment policies. As stated by the Sixth Circuit Court of Appeals in *Senter* v. *General Motors Corp.,* 532 F.2d 511, 527 (6th Cir. 1976), *cert. denied,* 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976):

> "An employee is at an inherent disadvantage in gathering hard evidence of employment discrimination, particularly when the discrimination is plant-wide in scope. It is for this reason that we generally acknowledge the value of statistical evidence in establishing a *prima facie* case of discrimination under Title VII."

Whether or not an *employer,* in adoption of a so called "affirmative action" plan, can rely solely upon statistical com-

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[70] The same evidence is claimed by defendants to demonstrate that past discrimination against blacks also violated the constitutional rights of blacks. This claim is discussed, *infra,* under the constitutional analysis.

parisons in an effort to prove prior discrimination in its employment practices appears to be highly questionable since the logic for allowance of such statistics would not apply. If an employer has discriminated against a group, intentionally or otherwise, the employer is the party in the best position to be able to produce concrete evidence of its prior discrimination. Normally, if an employee produces evidence of a statistical disparity the burden of explanation would shift to the employer. However, to require an employee, who charges the employer with discrimination against him, to refute the employer's reliance on statistical comparisons is an onerous burden which should not befall the employee. He is not in control of the evidence and has, as the discovery process in this case reveals, no reasonable means of gaining access to the alleged evidence. However, even if the employee must shoulder this burden it does not arise until the employer has produced the proper statistical comparisons as statistics come in infinite variety and, like any other evidence, they may be rebutted. *International Brotherhood of Teamsters* v. *United States, supra; Hazelwood School District* v. *United States, supra.*

In *Hazelwood* the Supreme Court discussed the proper role of statistics and statistical comparisons in an employment discrimination case grounded upon Title VII. The Court held that when special qualifications are required to fill particular jobs, comparisons to the general population, rather than to the smaller group of individuals who possess the necessary qualifications, may have little probative value. By contrast, the Court stated that the proper statistical comparison is between the composition of the employer's work force and the racial composition of those meeting the special qualifications in the relevant labor market. 433 U.S. at 308, 97 S.Ct. 2736.

Application of proper statistics pursuant to the dictates of *Hazelwood* demonstrate that in 1974, the point in time of the adoption of the affirmative action plan, the Detroit Police Department was 17.23% black. By comparison, 18.6% of those

meeting the special qualifications in the relevant labor market were black.[71]

The Department of Justice has issued Equal Employment Opportunity Guidelines which determine the significance of these figures. 28 C.F.R. § 42.301 *et seq.* These guidelines, although not enacted by the body having enforcement responsibility under Title VII, should be entitled to great deference.[72] *See, Griggs* v. *Duke Power Co., supra* 401 U.S. at 433-434, 91 S.Ct. 849.

28 C.F.R. § 42.306(c) provides:

> "(c) A significant disparity between minority representation in the service population and the minority representation in the agency workforce may be deemed to exist if the percentage of a minority group in the employment of the agency is not at least seventy (70) percent of the percentage of that minority in the service population."[73]

Application of § 42.306(c) to the foregoing percentages demonstrates that there was no "significant disparity" regarding black representation on the Detroit Police Department.[74]

However, even if there had been substantial difference with regard to proper statistical comparisons where the employer

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[71] 1970 census.

[72] The Department of Justice does, however, have enforcement responsibility under Title VI, 42 U.S.C. § 2000d. *See* 28 C.F.R. § 42.101 *et seq.*

[73] On February 16, 1977 the Department of Justice amended 28 C.F.R. § 42.206(b)(1) by substituting the term "relevant labor market" for the term "service population". Additionally, § 42.302(f) and the first sentence of § 42.306(b) of 28 C.F.R. § 42.301 *et seq.* were deleted. Accordingly, while the terms were not formally changed in § 42.306(c), the Court is quite confident that the intent of the Department of Justice was to require the employer's workforce to be compared with the relevant labor market and not the service population as formerly defined. Therefore, the Court will apply such a construction. *See* 42 FR 9492-9503 (1977).

[74] 18.6 X 10% = 13.20%.

is a public one consideration must be given to employment practices after March 24, 1972. As the *Hazelwood* Court stated:

> "Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes.[15]" (footnote omitted) 433 U.S. at 309, 97 S.Ct. at 2742.

Thus, notwithstanding the fact that at the point in time of the adoption of the affirmative action plan there was no significant disparity according to the Department of Justice, statistics regarding pass/fail rates on the entry examination antedating March 24, 1972 are inconsequential in determining if there had been a prior Title VII violation.[75] Further, as the Findings of Fact demonstrate, shortly after March 24, 1972, there was no disparate impact upon blacks as a result of entry examinations or any other portion of the entry process.

In the promotional model the Court's Findings of Fact reveal that the pass rate on the written examination in 1973, 1974 and 1976 for black males vis a vis white males was 65.1%, 73.2% and 82.3%, respectively. Defendants rely upon these figures to demonstrate disparate impact in the written examinations and therefore prima facie discrimination violative of Title VII.

The Office of Federal Contract Compliance Programs, Department of Labor, has issued guidelines, which the Court adopts, for the purpose of determining the significance of

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[75] Of course, a public employer even before the extension of Title VII in 1972 was subject to the command of the Fourteenth Amendment not to engage in purposeful racial discrimination. *Hazelwood School District* v. *United States*, at 309, footnote 15, 97 S.Ct. 2736.

these figures.[76] 41 C.F.R. § 60-3.1 *et seq.* Notwithstanding the fact that these guidelines, like those of the Department of Justice, have not been specifically adopted by the EEOC as protector under Title VII the Court will accord them due deference.

41 C.F.R. § 60-3.4(b) provides as follows:

> "A selection rate for any racial, ethnic or sex group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded as evidence of adverse impact. Smaller differences in selection rate may nevertheless be considered to constitute adverse impact, where they are significant in both statistical and practical terms. Greater differences in selection rate would not necessarily be regarded as constituting adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group."

By the terms of the foregoing guideline the 1973 and 1974 written promotional examinations had an adverse impact upon blacks while the 1976 examination did not. Adverse impact is considered by these guidelines to be discriminatory. 41 C.F.R. § 60-3.3(a); *See* 29 C.F.R. § 1607.3. However, adverse impact does not mandate a conclusion of discrimination if the procedure is validated in accordance with Equal Employment Opportunity Guidelines on Employee Selection Procedures and alternative suitable procedures do not exist. 29 C.F.R. § 1607.3; *See* 41 C.F.R. § 60-3.3(b), (c). Thus, it must be shown that the examinations have a manifest relationship to the job in question, that is, job related. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975);

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[76] These guidelines are substantially the same as those of the EEOC. *See* 29 C.F.R. § 1607.1 *et seq.*

Griggs v. *Duke Power Co., supra;* 29 C.F.R. § 1607.4(c); 41 C.F.R. § 60.3.12(c); *See* 42 U.S.C. § 2000e-2(h).

Validity of a written examination can be demonstrated by three basic methods: "empirical" or "criterion" validity (demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and criteria so identified); "construct" validity (demonstrated by examinations structured to measure the degree to which job applicants have identifiable characteristics that have been determined to be important in successful job performance); and "content validity" (demonstrated by tests whose content closely approximate tasks to be performed on the job by the applicant). *Washington* v. *Davis, supra,* 426 U.S. at 247, 96 S.Ct. 2040.

In the instant case the Findings of Fact of the Court, as shown by the overwhelming evidence, compel the conclusion that the 1973, 1974 and 1976 written promotional examinations were content valid.[77] 29 C.F.R. 1607.5; 41 C.F.R. 60-3.12(c). Further, the defendants have not shown that other tests or selection devices, without the adverse impact, would serve the employer's legitimate interest in efficient and trustworthy workmanship. Conversely, the plaintiffs' experts testi-

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[77] The Findings of Fact as shown by the evidence clearly indicate that the examinations were well developed tests consisting of suitable samples of the essential knowledge, skills or behaviors composing the job in question. 29 C.F.R. § 1607.5(a). The exams did not test types of knowledge, skills or behaviors which could be acquired in a brief orientation to the job. 29 C.R.R. § 1607.5(a). The tests were administered and scored under controlled and standardized conditions with proper safeguards to protect the security of test scores. 29 C.F.R. § 1607.5(b)(2). The work behaviors which the tests were intended to predict or identify were fully described. Moreover, the examinations represented and tested major or critical work behaviors as revealed by careful job analyses. 29 C.F.R. § 1607.5(3). The exams were patterned after procedures described in "Standards for Educational and Psychological Tests and Manuals" published by the American Psychological Association. Higher scores were expected to result in better job performance. 41 C.F.R. § 60-3.12(c)(2). The exams were representative samples of the performance domain of the job. 41 C.F.R. § 60-3.12(c)(3).

fied that suitable alternatives did not exist. *McDonnell Douglas Corp.* v. *Green, supra* 411 U.S. at 801, 93 S.Ct. 1817; *Albemarle Paper Co.* v. *Moody, supra* 422 U.S. at 425, 95 S.Ct. 2362.

Although the defendants have shown that the 1973-1974 written promotional examinations had a slight adverse racial impact upon blacks, the plaintiffs have satisfied their burden of showing that these examinations were content valid. Defendants having failed to rebut this fact or the fact that no suitable alternative existed without a similarly undesirable racial effect, the Court is bound, as a matter of law, to conclude that no discrimination existed in this area of the promotional models for 1973, 1974 or 1976.

No statistics were presented to the Court regarding the pass/fail ratios on promotional examinations prior to 1973. However, even if such statistics were available and presented such statistics, assuming an adverse impact against blacks by the terms of the guidelines, would not establish a violation of Title VII as the public employer did not become bound by Title VII until March 24, 1972. *Hazelwood School District* v. *United States, supra.*

The seniority component of the promotional model has been attacked by the defendants as a source of prior discrimination against blacks seeking positions as Sergeants.

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) provides in part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin . . .".

In *International Brotherhood of Teamsters* v. *United States, supra,* the Supreme Court, in addressing § 703(h), held that

although a seniority system tends to perpetuate the effects of pre-Act discrimination resulting in one group having greater seniority than another, Title VII does not outlaw, destroy or water down an otherwise neutral, legitimate seniority system or the vested seniority rights attendant thereto simply because the employer had engaged in discriminatory hiring or promotion prior to the passage of the Act. *Accord, United Air Lines* v. *Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *Trans World Airlines* v. *Hardison,* 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977).

As in *Teamsters,* the seniority system and the weight accorded it in the 1973-1976 promotional models is entirely bona fide. It applies equally to all races and has been negotiated for at arm's length between able parties. Most crucial, there is not a scintilla of evidence showing maintenance of such a system on the pretext of discrimination or any other unlawful purpose. In light of the Supreme Court's interpretation of § 703(h) and the fact that the instant seniority system is entirely bona fide, the Court holds, as a matter of law, that the seniority portion of the promotional model is immune from attack and cannot be said to constitute a form of discrimination against blacks prohibited by Title VII.

Service, or performance evaluation, ratings were also claimed to have discriminated against blacks. As factually found by the Court the statistical and testimonial evidence in the record demonstrates that service ratings did not impinge, discriminate or have any disparate impact against blacks. However, notwithstanding the inherent subjective nature of service ratings such evaluation tools are approved by the EEOC guidelines.

29 C.F.R. § 1607.5(b)(3) provides in part:

> ". . . [I]n the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they

must represent major or critical work behaviors as revealed by careful job analyses."

The Findings of Fact clearly demonstrate, and the Court must conclude, that service ratings have been installed in compliance with this guideline. Prior discrimination simply did not exist in the service rating component. *United States* v. *City of Chicago*, 411 F.Supp. 218 (N.D.Ill.1976), *aff'd in pertinent part*, 549 F.2d 415 (7th Cir. 1977); *Thompson* v. *McDonnell Douglas Corp.*, 416 F.Supp. 972 (E.D.Mo.1976); *Frink* v. *United States Navy*, F.Supp. (E.D. Pa.177); 16 F.E.P. Cases 67 (1977).

The educational, veteran's preference and oral board factors were not claimed by the defendants to be discriminatory against blacks.[78] Therefore, the Court concludes, as a matter of law, that no remaining component parts of the promotional models, either before or after the effective date of Title VII, constituted an unlawful barrier for blacks in the promotional process to the rank of Sergeant.

In the absence of proof of prior discrimination as claimed by the defendants the preferential promotion plan of the defendants clearly violates Title VII as an impermissible racial quota. 42 U.S.C. § 2000e-2(a), (j). This conclusion would persist even if the instant plan had been judicially mandated since as a precondition to quota type relief under the Act prior unlawful discrimination must be found to exist. Specifically, Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides, in part, as follows:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative ac-

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[78] Oral boards, as the Court has found, favored blacks. Veteran's preference is protected by Title VII. 42 U.S.C. § 2000e-11; *Commonwealth of Massachusetts* v. *Feeney*, 429 U.S. 66, 97 S.Ct. 345, 50 L.Ed 224 (1977).

tion as may be appropriate . . . or any other equitable relief as the court deems appropriate . . ."

A clear reading of Section 706(g) and the legislative history of the Act indicates that the section presupposes a finding of unlawful discrimination and that so-called "affirmative action" is a fluid equitable remedy always requiring, at a minimum, the cessation of employment practices and procedures which discriminate and the creation of employment policies designed to achieve equal opportunity for all. Section 706(g) may, in the proper case, allow the Court to impose quota type relief. *NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974); *United States* v. *City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167 (3rd Cir. 1977). Prior racial discrimination against blacks being absent in this case, the Court holds as a matter of law that Section 706(g) would not allow *any* quota regardless of whether it was voluntary or court ordered. To do so would be to install a remedy where there has been no wrong.

However, even if there had been proof of prior discrimination against blacks, Section 706(g) does not grant the employer, acting alone, the prerogative of fashioning quota type relief. This conclusion is based upon several observations. First, the prohibition of Section 703(a) of Title VII is directed solely to employers and not to the courts. Second, Section 706(g) directs that the courts are empowered to fashion remedies for violations of Section 703(a) and does not grant the same authority to the employer. To be sure voluntary compliance in eliminating unfair labor practices is the central theme of Title VII and is preferable to court action. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). However, installation of remedies designed to correct past unfair labor practices which discriminate against certain racial groups is a far cry from the equitable relief intended by Section 706(g). While Congress recognized that remedies must be fashioned to correct prior discriminatory practices and to cure the ill effects of past

discrimination, it was cognizant of the fact that courts alone are in a position to afford due process to all concerned in determining the necessity for and in fashioning such relief. *Reeves* v. *Eaves*, 411 F.Supp. 531 (N.D.Ga.1976); *Chmill* v. *City of Pittsburgh*, 31 Pa.Cmwlth. 98, 375 A.2d 841 (1977). *Compare*, Michigan Compiled Laws Annotated 37.2210. All will agree that relief in the nature of a quota is extreme and should be approached and imposed only with utmost care and caution in order that such extraordinary relief will be uniform and in existence only so long as is necessary to achieve the intended purpose.[79] An employer who readily admits it has discriminated in its employment practices in the past, intentionally or otherwise, can hardly be placed in a position of trust and confidence on a plateau with the courts who, without the stigma of the prior impermissible action, sit unblemished in fashioning relief for such prior discrimination. The reasoning that unless an employer can fashion quota type relief the voluntary compliance theme of Title VII will be subverted is particularly naive. Voluntary quota relief by an employer, as this case evidences, merely changes the racial makeup of the plaintiff class. Accordingly, the Court holds, as a matter of law, that quota relief, when fashioned by the employer without the assistance and direction of the court, is not permitted and runs afoul of Section 706(g) of Title VII.

There is another compelling reason why the instant promotional quota, even if it had been judicially imposed, could not withstand a Title VII assault. In *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2nd Cir. 1973); *cert. denied*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975), the Second Circuit sanctioned the use of hiring quotas in a police department where the evidence had shown prior discrimination in hiring. However, the Court

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[79] The defendants' plan lacked both these features. First, no consideration was given to whether groups *other than blacks* had been discriminated against in the past. Second, evidence in the record demonstrates that the plan was not temporary and terminable at a definite point in time.

reversed the district court's establishment of a promotional quota where the evidence had shown discrimination to be absent. Speaking for the Court, Judge Mulligan stated the *ratio decidendi* as follows:

> ". . . While past exclusionary hiring examinations do justify the quota remedy on entrance, there is no justification in our view for extending the remedy to higher ranks. We are discussing some 117 positions with time-in-grade requirements mandating three years' service as a patrolman, sergeant and lieutenant postponing promotion to captain for a minimum of nine years. While this factor will delay those of the minority groups who will become patrolman, the imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate, rather than diminish racial attitudes. (citations omitted). Police morale is again a proper concern if the welfare of the whole community is to be considered. We see no purpose in curing a past mischief by imposing a new one which is deliberately tainted . . ." *id.* at 1341.

Further explaining their rejection of promotion quotas, the Second Circuit in *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2nd Cir. 1975), *cert. denied*, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976), refused to order a promotional quota to the position of correction sergeant in the New York State Department of Correctional Services, notwithstanding the fact that the former promotional exam was found to be discriminatory.

In so holding the Court stated:

> "A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in

advance that regardless of their qualifications and standing in a competitive examination, some of them may be passed for advancement solely because they are white . . ." *id.* at 429.

Consistent with its prior decisions in *Kirkland* and *Bridgeport Guardians,* the Second Circuit in *Chance* v. *Board of Examiners,* 534 F.2d 993 (2nd Cir. 1976), *cert. denied,* 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977), refused a formula imposing a racial quota upon certain "excessing" procedures because of its effect upon small numbers of readily identifiable individuals. The Court stated:

> "Moreover, the concern which we expressed in *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420 (2nd Cir. 1975), about the 'bumping' effect of a quota 'upon a small number of readily identifiable' individuals finds equal cause for expression in the situation which now confronts us. We are advised that in some of the school districts employees will be excessed from groups containing as few as two or three persons. To require a senior, experienced white member of such a group to stand aside and forego the seniority benefits guaranteed him by the New York Education Law and his union contract, solely because a younger, less experienced member is Black, or Puerto Rican is constitutionally forbidden reverse discrimination." (footnote and citation omitted) *id.* at 998-999.

This Court agrees with, and adopts, the Second Circuit's observation that entry level quotas have a diffuse and less ascertainable effect than a quota used to hinder the promotional opportunities of readily identifiable members of the employer's work force. *White* v. *Carolina Paperboard Corp.,* 564 F.2d 1073 (4th Cir. 1977); *Lige* v. *Town of Montclair,* 72 N.J. 5, 367 A.2d 833 (1976); *Commonwealth of Pennsylvania* v. *O'Neill,* 348 F.Supp. 1084 (E.D.Pa.1972), *aff'd in part,* 473 F.2d 1029 (3rd Cir. 1973); *EEOC* v. *Local 638 of The Sheet Metal Workers International Association,* 532 F.2d 821 (2nd

Cir. 1976). In the entry level quota it is difficult to determine who it is that is being kept out and therefore less objectionable as a temporary remedy imposed by the courts pursuant to Section 706(g) of Title VII. However, where the indefinite quota, whether court imposed or voluntary, is in the area of promotions and prior discrimination has not been shown to exist with regard to the same, regardless of whether discrimination did or did not occur at the entry level, this is the type of narrowly focused ascertainable discrimination which is forbidden under Title VII of the Act.

Accordingly, for the reasons set forth above, the Court is bound, as a matter of law, to conclude that the defendants' voluntary affirmative action plan violates Sections 703(a), (e), (h), (j) and 706(g) of Title VII of the Act. Moreover, inasmuch as the Court's Findings of Fact demonstrate that defendants have received federal financial assistance in connection with their racial preference plan the Court is bound to conclude, as a matter of law, that defendants have also violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.[80] *Flanagan* v. *President & Directors of Georgetown College,* 417 F.Supp. 377 (D.C.D.C.1976); *Anderson* v. *San Francisco Unified School District,* 357 F.Supp. 248 (N.D. Cal.1972); *Associated General Contractors of California* v. *Secretary of Commerce,* 441 F.Supp. 955, (D.C.Cal.1977). Additionally, the Court concludes, as a matter of law, that the defendants have violated 42 U.S.C. § 1981.[81] *Long* v. *Ford Motor Co.,* 496 F.2d 500 (6th Cir. 1974); *Haber* v. *Klassen, supra; McDonald* v. *Santa Fe Trail Transportation Co., supra.*

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[80] 42 U.S.C. § 2000d provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[81] 42 U.S.C. § 1981 provides in part: "All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to . . . the full and equal benefit of all laws . . . as is enjoyed by white citizens."

State Statutory Claims

In addition to the Title VII violation plaintiffs have argued that the defendants' promotional practices violated the Michigan Fair Employment Practices Act, Michigan Compiled Laws Annotated § 423.301, *et seq.*, and the Michigan Civil Rights Act of 1977, Michigan Compiled Laws Annotated § 37.2101 *et seq.*[82]

An examination of these Acts reveals no provision which would allow a racial promotion system that in operation causes persons to be passed over solely because of their race. On the contrary, Sections 303[83] and 2202[84] would indicate a prohibition on the part of the employer from imposing arbitrary and discriminating promotional quotas.

A reading of these sections and Michigan precedent is persuasive authority that the quota system as advocated by defendants denies the plaintiffs their entitled promotions on the sole basis that they are white. *White* v. *Motor Wheel Corp.*, 64 Mich.App. 225, 236 N.W.2d 709 (1975); *Chrysler Corp.* v. *Civil Rights Commission*, 68 Mich.App. 283, 242 N.W. 2d 556 (1976); *Rand* v. *Civil Service Commission*, 71 Mich. App. 581, 248 N.W.2d 624 (1976). Consequently, such a denial is a violation of both the Fair Employment Practices Act and the Michigan Civil Rights Act of 1977. *Accord, Lige* v. *Town of Montclair, supra; Chmill* v. *City of Pittsburgh, supra.*

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[82] The Fair Employment Practices Act, M.C.L.A. § 523.301 *et seq.*, was repealed on March 31, 1977 and replaced by the Michigan Civil Rights Act of 1977, M.C.L.A. § 37.2101 *et seq.* The new act is patterned after Title VII of the Civil Rights Act of 1964, as amended in 1972.

[83] M.C.L.A. § 423.303(a) provides in part "It shall be an unfair employment practice: For any employer, because of race . . . to discriminate . . ."

[84] M.C.L.A. § 37.2202(1)(a) provides in part "An employer shall not: . . . discriminate against an individual with respect to employment because of . . . race . . ."

The Constitutional Challenge

The clear purpose of the Fourteenth Amendment of the United States Constitution is the prevention of invidious discrimination against individuals or groups on the basis of race. *Washington* v. *Davis, supra; Loving* v. *Virginia,* 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Classification based upon race renders the classification constitutionally suspect and subject to the most rigid judicial scrutiny. *Korematsu* v. *United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944); *McLaughlin* v. *Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964); *Loving* v. *Virginia, supra.*

It cannot be seriously disputed that purposeful racial classifications in the area of promotions did, in fact, exist and discriminated against whites. Therefore, not only must the purpose of the classification serve a compelling state interest, but it must be demonstrated by rigid judicial scrutiny that there is no reasonable way to achieve the states' goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification. *Dunn* v. *Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Associated General Contractors of California* v. *Secretary of Commerce, supra.*

Initially, defendants seek to satisfy the rigid standard and justify the 50% racial preference plan on the ground of historical unconstitutional discrimination against blacks in the Detroit Police Department, both in hiring and in promotions. They contend that the Constitution required installation of the racial preference plan as a remedy for its prior constitutional violations.[85]

It is clear that to the extent that defendants have relied upon statistical comparisons showing disparate impact as proof of former constitutional violations against blacks they have fundamentally misconceived the constitutional rule. In *Washington* v. *Davis, supra,* the Supreme Court stated that when employment discrimination on the basis of race is claimed

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[85] The Court has previously addressed this argument posited against Title VI and found it to be without legal viability.

a *purpose to discriminate* must be shown. Specifically, the Court stated:

> "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today . . . But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact . . . Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin* v. *Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justified only by the weightiest considerations . . ." *id.* 426 U.S. at 239, 242, 96 S.Ct. at 2047.

It is clear that, standing alone, statistics showing disparate impact do not prove a constitutional violation. Recognizing that decisions existed holding to the contrary which could create a persisting doubt, the Court further stated, in erasing such doubt, as follows:

> "The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement." *id.* at 244-245, 96 S.Ct. at 2050.

Aside from statistical comparisons defendants have claimed that prior to the installation of the voluntary "affirmative

action" plan blacks were treated differently than whites, essentially a claim of disparate treatment. While there was no evidence in this record showing such an allegation to be true, even if defendants had shown prior differential treatment to blacks vis a vis whites the claim of prior unconstitutional discrimination against blacks, without more, would fall short of a constitutional violation as it must be shown that the alleged differential treatment was *because* of the race of the group. Proof of discriminatory *purpose, intent,* or *motive,* be it evil or innocent, is required and absent such proof, as in the case at bar, there can be no constitutional violation.[86] *International Brotherhood of Teamsters* v. *United States, supra.*

Regardless of whether defendants' prior unconstitutional claim of discrimination against blacks is characterized as one of disparate impact or differential treatment, in order to establish a prior constitutional violation discriminatory *purpose* must be shown. In many cases an invidious discriminatory purpose may be inferred from the totality of the facts. In this case the totality of the facts dispels any such conclusion and merely reinforces the inference that the claim of intentional purposeful discrimination against blacks was but a mere after thought by the defendants in an attempt to achieve racial balance on the police force as the record is absolutely void of prior discriminatory purpose on the part of defendants towards blacks.

A second consideration which defendants have relied upon to justify the adoption of the racial preference plan has been a claimed risk of loss of Federal funds because of threats from the LEAA. Aside from the fact that such an assertion is not borne out by the evidence, it is wholly lacking in legal validity. The LEAA is not vested with the authority to

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[86] Regarding the plaintiffs' constitutional ground of race discrimination the evidence of discriminatory purpose and motive permeates the record. The fact that defendants claim their purpose is *innocent* is irrelevant. The crucial factor is only that plaintiffs were *purposely* treated different than blacks *because* of their race as the purpose need not be malignant.

condition grants upon the adoption of a quota system or to discontinue grants because of a refusal to adopt the same. Nor can the LEAA, unilaterally and without due process, terminate or suspend payments. 42 U.S.C. § 3766; 28 C.F.R. § 42.201 *et seq*. Clearly, defendants' threat of loss claim falls far short of the "compelling state interest" contemplated by the United States Supreme Court.

Finally, it is urged that certain "operational needs" required greater numbers of blacks on the police force. The claim of operational needs is premised upon the belief that the population of the City of Detroit, which is largely black, will cooperate more freely with a police department which racially reflects the makeup of the people it serves. In turn, crime will be reduced and the effectiveness of the department will be increased. These provincial beliefs are not borne out by the evidence as determined by the Court's Findings of Fact. Moreover, the Court would cite as forceful rejection to the narrowness implicit in the defendants' racial exclusivity concept the dissenting opinion of Justice Douglas in *DeFunis* v. *Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

> "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans . . ." *id*. at 342, 94 S.Ct. at 1718.

The evil of the departmental quota system lies in its effect, not in its "affirmative action" name.[87] While the purpose of

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[87] "Affirmative Action", as the Court would define it, means nothing more than taking *immediate* measures to eliminate existing employment practices and procedures which discriminate against *any* group and creating, in their place, employment policies, practices and procedures designed to achieve equal *opportunity* for all. Of course, it encompasses providing remedies for those *identifiable individuals* who have been sub-

a quota system is generally compassionate its effect is intolerable because it denigrates individuals by reducing them to a single immutable birth characteristic–skin pigmentation. The concept of a quota disregards the fact that persons are not fungible goods and that special qualifications may be required for the job in question. It prefers some while excluding others on the basis of an attribute totally unconnected with the merits of the promotional candidate. As Justice Douglas stated in *DeFunis:*

> "There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *id.* at 336-337, 94 S.Ct. at 1716.

Racial discrimination is as indefensible when practiced against whites as it is when practiced against blacks and does not become "reverse" merely because it is practiced against whites. "Reverse" discrimination is a misnomer as racial discrimination knows neither a course nor a direction. The keystone of a democratic government is the concept of

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jected to past discrimination. Many employers and employees, as well as the public at large, view affirmative action as requiring equality of result or proportionate representation in employment – thus mandating quotas to all minority groups regardless of whether they, as individuals, have been disadvantaged or discriminated against in the past. When viewed in this manner "affirmative action" is not only a vile misnomer but acts as the antithesis of equal opportunity. Clearly, if "affirmative action" is a term mandating equality of *result* then this country is not far from rejection of the concepts of individual merit and achievement – concepts which made this country the great nation that it is today.

equality, and to judge discrimination against whites in a different manner, when the same discrimination is practiced against blacks, would be to resurrect the "separate but equal" doctrine, a philosophy presumably buried long ago.

The goal of equal opportunity in employment is a laudable one, but cannot be achieved by the use of a racial quota which necessarily runs counter to the constitutional mandate of the Fourteenth Amendment. Inevitably race quotas do not accomplish the result of equal employment opportunity.[88] The polarization of races that quotas exhibit creates a divided police department—instead of unifying and strengthening it, the quota underscores differences and sows seeds of internal hatred. To sanctify the department's quota would be to judicially insult the black police officers of the department. In effect the Court would be telling them that a quota is needed in order for them to obtain a promotion. Lack of a sense of selfworth is one of the major ills of the legacy of discrimination and should not be reinforced by telling these officers that they owe their position to a quota. As the California Supreme Court states in *Bakke* v. *Regents of University of California*, 18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152 (1976) *cert. granted*, 429 U.S. 1090, 97 S.Ct. 1098, 51 L.Ed.2d 535 (1977):

> "The divisive effect of such preferences needs no explanation and raises serious doubts whether the advantages obtained by the few preferred are worth the inevitable cost to racial harmony.[32] The over-emphasis upon race as a criterion will undoubtedly be counterproductive: rewards and penalties, achievements and failures, are likely to be considered in a racial context

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[88] Even if defendants had proven prior discrimination against blacks the quota does not have the quality of providing that those victims of the prior discrimination are in fact made whole or that the discriminators are punished. Many of those preferred are merely the recipient of a gratuity that respectfully belongs to another. So too, many of those victimized by the quota may have had absolutely no connection with the prior discrimination.

through the school years and beyond. Pragmatic problems are certain to arise in identifying groups which should be preferred or in specifying their numbers, and preferences once established will be difficult to alter or abolish; human nature suggests a preferred minority will be no more willing than others to relinquish an advantage once it is bestowed. Perhaps most important, the principle that the Constitution sanctions racial discrimination against a race—any race—is a dangerous concept fraught with potential for misuse in situations which involve far less laudable objectives that are manifest in the present case." (footnote omitted).

If better public communication would exist by hiring more blacks and promoting more blacks to supervisory positions then the problem lies in a racially motivated populus. In the eyes of this Court catering to such racial prejudice cannot be said to be "compelling". On the contrary, the Court would consider it to be pandering. If the defendants' claim of "operational need" can be considered as compelling then apparently any all white community, via the police department, could lay claim to such a "compelling interest" in forming a basis to reject all non-whites.[89]

No one can doubt that a police officer is a professional in every sense of the word. Ordinarily he makes more decisions and exercises broader discretion day in and day out than a judge does in a week. Indeed, these professionals have only minutes—sometimes seconds—to make decisions that perplex experienced judges for months, who may even then divide five to four or two to one. Our society expects that these professional officers will not only enforce the law in determining what constitutes a constitutional arrest or search but also act as a curbside psychiatrist, social worker, legal adviser, minister and doctor. Cognizant of these factors the tax paying

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[89] Chief Hart, a black, agreed with such logic when questioned by the Court whether Dearborn, an essentially all-white community, could reject blacks on this basis.

community is entitled to the services of the most qualified police officers and supervisors available—without regard to unconstitutional racial considerations. Those who would have this Court do otherwise do violence to common sense.

Defendants have claimed that "what is a good social policy is good law".[90] Whether or not a quota is good social policy, the Court holds it to be unconstitutional law insofar as it allows discriminatory promotions. *Cramer* v. *Virginia Commonwealth University*, 415 F.Supp. 673 (E.D.Va. 1976). Until racial discrimination is uprooted from employment practices the seeds of racial harmony will never be sown either in this city or the country. However, the fact that a racial group, *any* racial group, suffered its own special injustice does not make one such group different in the eyes of the law—for the remedy for racial discrimination is not more racial discrimination. In this day and age race is an impermissible criterion for judging either the employee's qualifications or the employer's needs. As the Court states in *Commonwealth of Pennsylvania* v. *O'Neil, supra,*

> "In our democracy rights are accorded primarily to individuals, as distinguished from groups. Opening the doors long shut to minorities is imperative, but in so doing, we must be careful not to close them in the face of others, lest we abandon the basic principle of nondiscrimination that sparked the effort to pry open those doors in the first place." 4 F.E.P. Cases 1289-1290.

To uphold the department's promotional policies and practices would be to adopt an approach profoundly at odds with the traditions of individual merit and race neutrality, concepts implicit in the Constitution and of fundamental importance to *all* races. Cognizant of the fact that we are indeed a nation of minorities and believing in equality of *opportunity* and

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[90] Testimony of defendant Avern Cohn, November 11 1977. Mr. Cohn, is an attorney and former member of the Michigan Civil Rights Commission.

non-discrimination in every phase and activity of human life, the Court holds, as it must if it is to live by the Constitution, that the racial preference promotional practices of the Detroit Police Department cannot withstand a constitutional assault and violate the rights guaranteed to whites by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Section 1983 of Title 42 of the United States Code, and Article I section 2 of the Constitution of the State of Michigan.

In view of all of the above considerations, it is the conclusion of this Court that judgment be entered in favor of the plaintiffs, and against defendants, granting a permanent injunction restraining defendants from any further implementation of affirmative action or any other program that offends the Equal Protection Clause of the Fourteenth Amendment, and Section 2000e-2(a) and (j) of Title VII. Henceforth, race shall not be a factor to be considered in the promotional practice of defendants.

An appropriate Order shall issue.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1163

DETROIT POLICE OFFICERS' ASSOCIATION, et al.,
Plaintiffs-Appellees,

v.

COLEMAN A. YOUNG, Mayor
of the City of Detroit, et al.,
Defendants-Appellants.

JUDGMENT

(Filed October 12, 1979)

Before: CELEBREZZE, LIVELY and MERRITT, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the injunction entered by it is vacated. All claims of the Plaintiffs based on the contention that the affirmative action program for promotion to sergeant violates Title VI, Title VII and § 1981 are dismissed and the cause remanded for further consideration.

It is further ordered that Defendants-Appellants recover from Plaintiffs-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

A True Copy.

Attest:

/s/ BARBARA J. BURNS
Deputy Clerk

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV, Section 1, provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Michigan Constitution of 1963, Art. XI, Section 6 provides:

§ 6. Merit systems for local governments

Sec. 6. By ordinance or resolution of its governing body which shall not take effect until approved by a majority of the electors voting thereon, unless otherwise provided by charter, each county, township, city, village, school district and other governmental unit or authority may establish, modify or discontinue a merit system for its employees other than teachers under contract or tenure. The state civil service commission may on request furnish technical services to any such unit on a reimbursable basis.

STATUTORY PROVISIONS

Jurisdictional

28 U.S.C. § 1343 provides:

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

28 U.S.C. § 1331 provides:

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the

sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

Substantive

42 U.S.C. § 1981 provides:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

42 U.S.C. § 2000d provides:

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub.L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.

42 U.S.C. § 2000d-3 provides:

§ 2000d-3. Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Pub.L. 88-352, Title VI, § 604, July 2, 1964, 78 Stat. 253.

Statutes

42 U.S.C. § 2000e-2 provides, *inter-alia*:

§ 2000e-2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed,

intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

Section 7-1114 of the Charter of the City of Detroit (1976) provides:

Sec. 7-1114. Promotions.

The chief of police shall make all promotions within the department. All promotions shall be with the approval of the board.

Promotions shall be made on the basis of competitive examinations administered by the director of police personnel except for positions above the rank of lieutenant or its equivalent. All examinations will be prepared by the division of police personnel with the concurrence of the board. No person who has taken an examination and has been placed on a register of employees eligible for promotion may be passed over in favor of an employee with a lower examination score unless the chief of police files with the board and the division of police personnel written reasons acceptable to the board. Any person having been passed over may appeal to the board.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1080

DETROIT POLICE OFFICERS ASSOCIATION, et al.,

Petitioners,

v.

COLEMAN A. YOUNG, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

PAGE

Opinions Below 1

Statement of the Case 1

Reasons for Denying the Writ 3

I. No Questions Are Properly Presented For Review at This Time 3

II. The Sixth Circuit's Decision Does Not Conflict With the Decisions of Other Circuits or of This Court 6

Conclusion 11

Table of Cases

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 9n

American Construction Co. v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372 (1893) 3n

Baker v. *City of Detroit*, Civil Action Nos. 5-71937, 5-72264 (E.D. Mich., Oct. 1, 1979) 9n

Bridgeport Guardians, Inc. v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) 6, 7n

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & A. R.R.*, 389 U.S. 327 (1967) 3

Chance v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977) 7n

EEOC v. *AT & T Co.*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) 7n

PAGE

EEOC v. *Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979) 6
Estelle v. *Gamble*, 429 U.S. 97 (1976) 3n

Firefighters Institute for Racial Equality v. *City of St. Louis*, 21 F.E.P. Cases 1140 (8th Cir. 1980) 7n
Firefighters Institute for Racial Equality v. *City of St. Louis*, 588 F.2d 235 (8th Cir. 1978), *cert. denied*, 99 S.Ct. 3096 (1979) 7n
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 3

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 10n
Kirkland v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir.), *rehearing en banc denied*, 531 F.2d 5 (1975), *cert. denied*, 429 U.S. 823 (1976) 7n

Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 3n

National League of Cities v. *Usery*, 426 U.S. 833 (1976) 10n
New York City Transit Authority v. *Beazer*, 440 U.S. 568 (1979) 3

Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978) 4, 8, 9, 9n, 10n

Sandstrom v. *Montana*, 61 L.Ed.2d 39 (1979) 3
Sherrill v. *J.P. Stevens & Co.*, 551 F.2d 308, 13 E.P.D. ¶ 11,422 (4th Cir. 1977) 7n
United States v. *City of Chicago*, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977) 7n
United States v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) 7n

PAGE

United Steelworkers v. *Weber*, 61 L.Ed.2d 480 (1979) 4, 5n, 7, 8, 10

Uzzell v. *Friday*, 591 F.2d 997 (4th Cir., Feb. 2, 1979) (en banc), *opinion withdrawn*, No. 75-2276 (4th Cir., Nov. 9, 1979) (en banc) 8

Watkins v. *Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976) 7n

White v. *Carolina Paperboard Corp.*, 564 F.2d 1073 (4th Cir. 1977) 7n

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 3n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1080

DETROIT POLICE OFFICERS ASSOCIATION, et al.,

Petitioners,

v.

COLEMAN A. YOUNG, *et al.*,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

Opinions Below

The district court's opinion is reported at 446 F. Supp. 979, and the Sixth Circuit's opinion is reported at 608 F.2d 671. Both opinions are reprinted in the appendix to the petition.

Statement of the Case

The plaintiffs, petitioners here, challenge the City of Detroit's affirmative action plan for the promotion of police officers to the rank of sergeant. The plan was adopted in 1974, after a long history of racial discrimination by the City in its police employment practices and after decades of hostility and violence—including the tragic race riots of

1943 and 1967—between the black community and the police. The plan provided that, subject to the continued availability of qualified officers of both races, and under the supervision and periodic review of the Board of Police Commissioners, approximately equal numbers of black and white officers would be promoted to the rank of sergeant.

The district court held that the plan violated, *inter alia,* the Fourteenth Amendment to the United States Constitution, Titles VI and VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. §§ 1981 and 1983. The district court entered a permanent injunction prohibiting the City from promoting police officers to the rank of sergeant pursuant to the affirmative action plan and forbidding the consideration of race as a factor in promotional decisions.

The Sixth Circuit reversed the judgment and remanded the case for the district court to reconsider the constitutional issues and, if it finds the affirmative action plan to be constitutional, to determine the reasonableness of the plan's 50/50 ratio and to establish a formula for the plan's eventual termination. The court of appeals held that, due to errors of law and an impermissibly restrictive view of the evidence, the district court had failed to give adequate consideration either to the extensive evidence of the police department's prior discrimination against blacks or to the City's substantial need to increase the numbers of black officers in all ranks in order to provide effective law enforcement to the people of Detroit. The Sixth Circuit reviewed the record in detail, dismissed the plaintiffs' claims under Title VI, Title VII, and § 1981, and remanded the remaining issues for determination by the district court.

REASONS FOR DENYING THE WRIT

I.

No Questions Are Properly Presented For Review at This Time.

As a rule, this Court will not issue a writ of certiorari to review a nonfinal appellate decision which, like the Sixth Circuit's decision here, remands a case to the district court for a determination of critical facts. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967) (per curiam). The lack of finality "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Where, as here, there are critical factual and constitutional questions which have not been decided by either of the courts below, this Court should not review the case. See *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 583-84 n.24 (1979); *Sandstrom* v. *Montana*, 61 L.Ed. 2d 39, 53 (1979).[1]

There is no final decision in this case. Indeed, the Sixth Circuit has remanded the case to the district court for a determination which may resolve the dispute in petitioners' favor. It is clear from the district court's February 1978

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[1] The Court generally reviews interlocutory decisions only where "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause," *American Construction Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893), *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-85 (1952), or where there is a straightforward issue of law—for example, a jurisdictional question—that is basic to the continued litigation of the case, see, e.g., *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949). Because these exceptional circumstances are not present in the instant case, the Court should follow its "nomal practice of denying interlocutory review." *Estelle* v. *Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting).

opinion that it did not correctly anticipate or properly address the critical factual and legal questions which this Court subsequently identified in *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978), and *United Steelworkers* v. *Weber,* 61 L.Ed.2d 480 (1979). See Section II, *infra.*

After reviewing the conflict between the opinion of the district court in the instant case and the opinions of this Court in *Bakke* and *Weber,* the Sixth Circuit outlined the complex factual and legal questions to be decided by the district court in order properly to assess the constitutionality of Detroit's plan. The district court must now determine whether the plan was justified by the need to remedy past discrimination, 608 F.2d at 694-95 (A. 32a-33a), or by the need to provide effective law enforcement and to reduce racial tensions between the police and the black community, *id.* at 695-96 (A. 34a-36a). As the Sixth Circuit noted, this determination may involve a number of subsidiary questions:

> [W]hether appropriate findings were made by a public body "with competence to act in this area" . . . [;]
>
> * * *
>
> whether "there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities" . . . ; whether any discrete group or individual is stigmatized; . . . whether use of race is reasonable in light of the objectives of the plan . . . ; . . . [and whether] no other approach offers a practical means of achieving the ends of the program in the foreseeable future. *Id.* at 694 (A. 32a-33a) (citations omitted).

If the district court finds that race-conscious affirmative action is constitutionally permissible in the circumstances presented here, then it must determine whether the plan's 50/50 ratio is reasonable and whether provisions for terminating the plan should be established by the court.[2] 608 F.2d at 696-98 (A. 36a-40a). The district court's consideration of these issues may require it to resolve such additional questions as "whether the affirmative action plan is 'substantially related' to the objectives of remediation of prior discrimination and improved law enforcement," and whether the plan achieves these objectives "without unnecessarily trammeling the interests of white candidates for promotion." *Id.* at 696 (A. 37a).

In sum, the decisions of the courts below do not provide an opportunity for full review by this Court of the critical factual and constitutional questions in this case. The proceedings in the district court on remand may resolve those questions in a manner which will be appropriate for review by this Court at a later time. However, until a final decision has been made below, review should be denied.

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[2] The City instituted the plan as a temporary measure. The Sixth Circuit stated that, as in this Court's approval of a similar plan in *Weber*, the remedial and temporary aspect of the plan was essential to its approval and that "[u]nless the parties are able to agree on provisions for termination of the plan . . . , this will be an ingredient of the final judgment." 608 F.2d at 698 (A. 40a).

II.

The Sixth Circuit's Decision Does Not Conflict With the Decisions of Other Circuits or of This Court.

The conflicts asserted by petitioners do not exist. The decision in *EEOC* v. *Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979), like the decision below, recognizes that "[s]tatistically, disparate impact can be shown in a variety of ways," including the use of applicant flow data, statistics showing the racial impact of selection procedures, and comparisons of an employer's minority hiring record with the minority population in a community's labor force. 593 F.2d at 990. In *Navajo Refining,* the court found that "the actual percentage of [minority persons] hired compares favorably with the percentages under any appropriate measure." *Id.* at 991.[3] Here the Sixth Circuit carefully considered a variety of appropriate measures, but the facts required it to reach the opposite conclusion: "Application of these benchmarks indicates a gross disparity between black employment in the Department and black representation in the city's labor market and general population." 608 F.2d at 688 (A. 20a).

Petitioners also contend that the decision below conflicts with a line of cases following *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975). Although some of these decisions disapprove judicial imposition of race-conscious numerical promotion relief in litigated

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[3] The court in *Navajo Refining* found that it could not consider hiring statistics for years prior to 1969 because in that year the defendant had acquired the refinery as a going concern from an unrelated owner. 593 F.2d at 991. No such limitation applies to the case at bar.

cases,[4] none of them holds or suggests that an employer may not voluntarily adopt such a plan to eliminate a manifest racial imbalance. As the Court noted in *United Steelworkers* v. *Weber, supra,* "since the . . . plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proven violation of the Act." 61 L.Ed.2d at 487. Even if the issue were one of the court's power rather than the employer's prerogative, the great weight of authority supports the judicial imposition of numerical promotion relief to correct proven discrimination in promotions.[5]

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[4] In *Bridgeport Guardians* there was no finding of discrimination in promotions to justify the district court's imposition of numerical promotion relief. 482 F.2d at 1341. The decision of the panel in *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420 (2d Cir.), *rehearing en banc denied,* 531 F.2d 5 (1975), *cert. denied,* 429 U.S. 823 (1976), was followed by the author of the *Kirkland* opinion and by one other Second Circuit judge in *Chance* v. *Board of Examiners,* 534 F.2d 993 (2d Cir. 1976), *cert. denied,* 431 U.S. 965 (1977), but has been rejected by three Second Circuit judges as inconsistent with other decisions of the circuit, *Kirkland, supra,* 531 F.2d at 5-11 (Mansfield, Kaufman, and Oakes, JJ., dissenting from denial of rehearing en banc).

In *White* v. *Carolina Paperboard Corp.,* 564 F.2d 1073 (4th Cir. 1977), the court reversed a promotional quota where none of the victims of discrimination could take advantage of it and there was no "compelling need" for it. 564 F.2d at 1091-92. But the Fourth Circuit has upheld such relief where it is appropriate. See *Sherrill* v. *J.P. Stevens & Co.,* 551 F.2d 308, 13 E.P.D. ¶ 11,422, at 6414 (4th Cir. 1977).

[5] See *Firefighters Institute for Racial Equality* v. *City of St. Louis,* 21 F.E.P. Cases 1140, 1148-49 (8th Cir. 1980); *Firefighters Institute for Racial Equality* v. *City of St. Louis,* 588 F.2d 235 (8th Cir. 1978), *cert. denied,* 99 S.Ct. 3096 (1979); *EEOC* v. *AT & T Co.,* 556 F.2d 167, 177 (3rd Cir. 1977), *cert. denied,* 438 U.S. 915 (1978); *United States* v. *City of Chicago,* 549 F.2d 415, 436-37 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977); *Sherrill* v. *J.P. Stevens & Co.,* 551 F.2d 308, 13 E.P.D. ¶ 11,422 at 6414 (4th Cir. 1977); *Watkins* v. *Scott Paper Co.,* 530 F.2d at 1159, 1194 (5th Cir. 1976); *United States* v. *N.L. Industries, Inc.,* 479 F.2d 354, 377 (8th Cir. 1973).

In citing *Uzzell* v. *Friday,* 591 F.2d 997 (4th Cir., Feb. 2, 1979) (en banc), petitioners have relied on an opinion which the Fourth Circuit has withdrawn because the case was argued before an improperly constituted en banc court. *Uzzell* v. *Friday,* No. 75-2276 (4th Cir., Nov. 9, 1979). Moreover, because the facts of *Uzzell* are plainly distinguishable from the facts here, there was never a conflict between the two decisions. The original panel in *Uzzell* found that racial classifications used by a state university to assure minority representation in student government and student courts were "without either reasonable basis or compelling interest", 547 F.2d 801, 804 (4th Cir. 1977). On reconsideration in light of this Court's decision in *Regents of the University of California* v. *Bakke, supra,* the improperly constituted en banc majority emphasized that the university had "failed to demonstrate that the accomplishment of the State's purpose necessitates its use of a suspect classification . . ." 591 F.2d at 1000. In the instant case, respondents submit, the evidence demonstrates that Detroit's affirmative action plan was necessary to remedy past discrimination in its police employment practices, that the plan properly removed the adverse impact from the police department's unvalidated promotional model, and that the plan served the City's compelling interest in overcoming the effects of past discrimination and providing effective police services to the people of Detroit. The Sixth Circuit has remanded the case for the district court to determine whether this evidence satisfies the requirements of *Bakke.*

Finally, the decision of the Sixth Circuit is fully consistent with the guidance provided by a majority of this Court in the *Bakke* and *Weber* cases. The Court in *Bakke* held under Title VI and the Fourteenth Amendment that "the State has a substantial interest that legitimately may be served by a properly devised [medical school] admissions

program involving the competitive consideration of race and ethnic origin." 438 U.S. at 320 (Powell, J., joined by Brennan, White, Marshall, and Blackmun, JJ.). Four Justices summarized the central meaning of the Court's opinions in the following way:

> Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area. *Id.* at 325 (Brennan, White, Marshall, and Blackmun, JJ.).

The Sixth Circuit correctly applied the opinions in *Bakke* to the facts of this case. See 608 F.2d at 694-95 (A. 32a-33a).[6]

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[6] Petitioners have noted that the Sixth Circuit did not expressly reverse the district court's holding that the examinations for sergeant which the City instituted in 1973 were job-related and nondiscriminatory. It was unnecessary for the appellate court to reach this question; it found that Detroit's plan was permissible under Title VI, Title VII, and § 1981—and may be found by the district court on remand to be permissible under the Fourteenth Amendment—even if the present promotional model could be shown to select the more qualified applicants. Moreover, the record demonstrates that the written test, a major portion of the model, was not job-related and, if used without an affirmative action adjustment, would have unlawfully excluded black officers from promotion. See *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 435 (1975); *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 364 n.37 (Brennan, White, Marshall, and Blackmun, JJ.), 306 n.43 (Powell, J.). In a closely related case involving Detroit's affirmative action plan for the promotion of sergeants to the rank of lieutenant, Circuit Judge Keith, sitting by designation in the district court, has addressed this question at length and concluded that the written test is not job-related. *Baker* v. *City of Detroit,* Civil Action Nos. 5-71937, 5-72264, at 60 (E.D. Mich., Oct. 1, 1979). Judge Keith upheld the affirmative action plan "as proper under federal and state law . . . because it undoes years of discrimination[,] . . . because it serves vital City needs . . . [and] because it looks to the future as a means of remedying a sorry past." *Id.* at 108-109 (footnote omitted).

The Sixth Circuit also correctly applied this Court's decision in *Weber*. See 608 F.2d at 689-91 (A. 23a-26a). Here, as in *Weber*, the plan is "designed to break down old patterns of racial segregation and hierarchy"; it "does not unnecessarily trammel the interests of the white employees"; and it "is a temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." 61 L.Ed.2d at 492. The Sixth Circuit, concluding that the federal regulation imposed by Title VII on affirmative action by state and local governments is no more stringent than that imposed on private industry, accordingly upheld Detroit's plan. The statutory language,[7] the legislative history,[8] and the constitutional underpinnings[9] of Title VII demonstrate that the Sixth Circuit was correct in rejecting a double standard.

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[7] Section 703(a), (j), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), (j).

[8] See *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 353-54 n.28 (Brennan, White, Marshall, and Blackmun, JJ.).

[9] See *Katzenbach* v. *Morgan,* 384 U.S. 641, 651 (1966); *National League of Cities* v. *Usery,* 426 U.S. 833, 851 (1976).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1080

DETROIT POLICE OFFICERS ASSOCIATION,
A Voluntary Mutual Benefit Association, Labor Organization,

Petitioner,

v.

COLEMAN A. YOUNG,
Mayor of the City of Detroit, et al.,

Respondents,

WILLIAM MORGAN, BRIAN BRUNETT and DONALD PRINCE,
Individually and as Representatives of a Class,

Petitioners,

v.

COLEMAN A. YOUNG,
Mayor of the City of Detroit, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

Page

THE COURT MAY PROPERLY REVIEW THE OPINION AND ORDER OF THE SIXTH CIRCUIT 1

TABLE OF CASES

Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959) 2

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Arrowstook Railroad Co.*, 389 U.S. 97 (1967) 3

Estelle v. Gamble, 429 U.S. 97 (1960) 2

Hamilton Shoe Company v. *Wolf Bros.*, 240 U.S. 251 (1960) 3

Land v. *Dollar*, 330 U.S. 731 (1947) 2

New York City Transit Authority v. *Beazer*, 440 U.S. 568 (1979) 4

United States v. *General Motors Corporation*, 323 U.S. 373 (1945) 2, 5

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 3

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THE COURT MAY PROPERLY REVIEW THE OPINION AND ORDER OF THE SIXTH CIRCUIT

As its primary argument against Plaintiffs' Petition, the City contends that the order of the Court of Appeals does

not finally terminate the litigation involved in the Detroit Department's promotional quota. This argument seeks to direct the Court's attention away from the key issues finally disposed of by the Sixth Circuit. The October 12, 1979 opinion of the Court of Appeals reversed the findings of the District Court and dismissed the Plaintiffs' claims under Titles VI and VII of the Civil Rights Act of 1964, and under 42 U.S.C. § 1981. These claims are finally resolved and there will be no further proceedings on them in the district court.

The proceedings on remand would apply only to the Fourteenth Amendment claims of the white Detroit police officers. And the standards outlined for that Constitutional review, Plaintiffs believe, clearly establish the basis for ultimate reversal by this Court. (*See,* Petition, pp. 59-87).

This Court has often granted petitions in cases where all claims have not been finally resolved. Relevant orders and opinions of the Court evidence a practical approach which allows review where the issues presented are "fundamental to the further conduct of the case", and their resolution is likely to shorten rather than lengthen the time needed to bring the case to final judgment. *See United States* v. *General Motors Corporation,* 323 U.S. 373, 377 (1945); *see also, Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959); and *Land* v. *Dollar,* 330 U.S. 731, 734, n.2 (1947).

The City argues that this case does not present the types of issues or the procedural context justifying immediate review. However, the authorities cited by the City are clearly distinguishable from this case and its extensive record and exhaustive consideration in both the district and appellate courts.

In *Estelle* v. *Gamble,* 429 U.S. 97 (1976), a case relied upon by the City, the Court reversed an appellate order

which remanded for trial the District Court's dismissal of a prisoner's complaint. The majority agreed to review and reverse on the pleadings, without any factual record, and before trial could occur.

The City relies upon Justice Stevens' dissent, which raised the issue of finality. That dissent specifically notes that the case involved "settled law" and that

> "The crude allegations of this complaint do not provide the kind of factual basis the Court normally requires as a predicate for the adjudication of a novel and serious constitutional issue. . . ." 429 U.S. at 115.

Unlike the circumstances described by Justice Stevens in his dissent, the plaintiffs do not ask this Court "merely to affirm settled law", *Id* at 115. Rather, the Sixth Circuit's opinion involves an unsettled area of law, which this Court has not fully addressed, and regarding which the Circuits are in conflict. This case arises from detailed findings of fact derived from an extensive record, rather than the crude *pro se* pleadings described by Justice Stevens in *Estelle*.

Unlike the petitioners in *Youngstown Sheet & Tube Company* v. *Saywer,* 343 U.S. 579 (1952), the plaintiffs did not seek review upon the Sixth Circuit's order staying the District Court's preliminary injunction in June of 1977. Rather, Plaintiffs waited to seek review until after a full trial on the merits and detailed opinions were issued by the district and appellate courts. Of course, in *Youngstown* the Court also agreed to hear a non-final order.[1]

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[1] The other authorities cited by the City are also inapplicable. The Court's opinion in *Hamilton Shoe Company* v. *Wolf Bros.*, 240 U.S. 251, 256 (1960) did not grant or deny a petition for a writ of certiorari. The factual context of *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Company,* 389 U.S. 327 (1967), which arose from relatively brief contempt proceedings aris-

This case certainly presents the types of issues and circumstances justifying review by this Court, prior to any further action in the District Court.

The findings of the District Court resulted from months of testimony and volumes of documentary exhibits. It is unimaginable that any party can now unearth new evidence relevant to the Constitutional "standards" purportedly allowing racial discrimination which are described by the Sixth Circuit in its opinion (31a-32a). The death of Judge Kaess will force a new district court judge to sift through the record one more time, in search of answers to the questions presented by the Sixth Circuit's opinion (32a). The same record, of course, was before the Sixth Circuit at the time it heard and resolved this case.

A time-consuming remand and re-appeal will also unreasonably prejudice the rights of the Plaintiff class. The order of October 12, 1979 ended the permanent injunction of the District Court, and the Sixth Circuit has declined to preserve that injunction pending action upon this Petition. During the period from February 19, 1978 through October, 1979, when the District Court's injunction was in effect, no promotions were made by the City to the rank of sergeant. The District Court's injunction did not bar promotions, but simply barred the use of a racial quota for any promotions that might occur. (104a). The City chose not to promote when faced with such a restriction.

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ing from the violation of a temporary restraining order, is clearly distinguishable from the detailed evidentiary record and significant issues presented by this case.

The case of *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 583-84 N.24 (1979), also cited by the City, involved, *inter alia*, the review by the Court of Title VII issues never addressed by the Court of Appeals. This Court agreed to review those issues, rather than remand them, because of the complete record presented by the case. All issues presented by Plaintiffs' petition have been exhaustively litigated by the parties and fully addressed by the lower courts.

Since the mandate of the Sixth Circuit was issued in this case, the City has been free to promote through use of a racial quota. The Plaintiff class, which never benefited from racially neutral promotions under the injunction, is now exposed to further injury if and when new promotions are made on a 50/50 racial basis. Further delay in an action brought by the DPOA nearly six years ago, on June 10, 1974, will unnecessarily burden the members of the Plaintiff class by allowing the relatively few promotional opportunities available in the coming months to be distributed solely by race, rather than by merit. As more promotions are made under the quota, it will become increasingly difficult for the Courts and the City to remedy the violations and make the Plaintiffs whole should they ultimately prevail.

The Court now has the opportunity to fully and finally resolve the statutory and Constitutional issues presented by the 50/50 promotional quota adopted by the Detroit Department in 1974. The questions presented by the Sixth Circuit's opinion are clearly "fundamental to the further conduct of the case". *United States* v. *General Motors Corp., supra* at 377. In fact, they are dispositive. After more than five years of litigation, the members of the Plaintiff class can reasonably expect the federal courts to resolve their claim of improper racial discrimination, one way or the other, without further delay. The proceedings on remand proposed by the City, in lieu of consideration by this Court, will likely delay by several years the ultimate day of judgment upon the City's racial quota. Yet new proceedings cannot add appreciably to the record upon which the Sixth Circuit or this Court might judge the Constitutionality of that quota.

The interests of the Plaintiff class in a prompt resolution of its claims, and the interests of the Federal courts in

the economy of proceedings coincide. This action need not be subjected to further review below when consideration by this Court can promptly and finally resolve the fundamental issues it presents.

Respectfully submitted,

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